Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ANDREW C. SCHIFFER,
Petitioner,

vs.

TARRYTOWN BOAT CLUB, INC.,
and its BOARD OF DIRECTORS individually,
JOHN MILLAR, KEVIN McDERMOTT,
ROBERT ROSSI, EDWARD THOMAS,
DONALD BRAINARD, THOMAS KENEALY,
ANTHONY ISMAILOFF, and JOHN PUFF,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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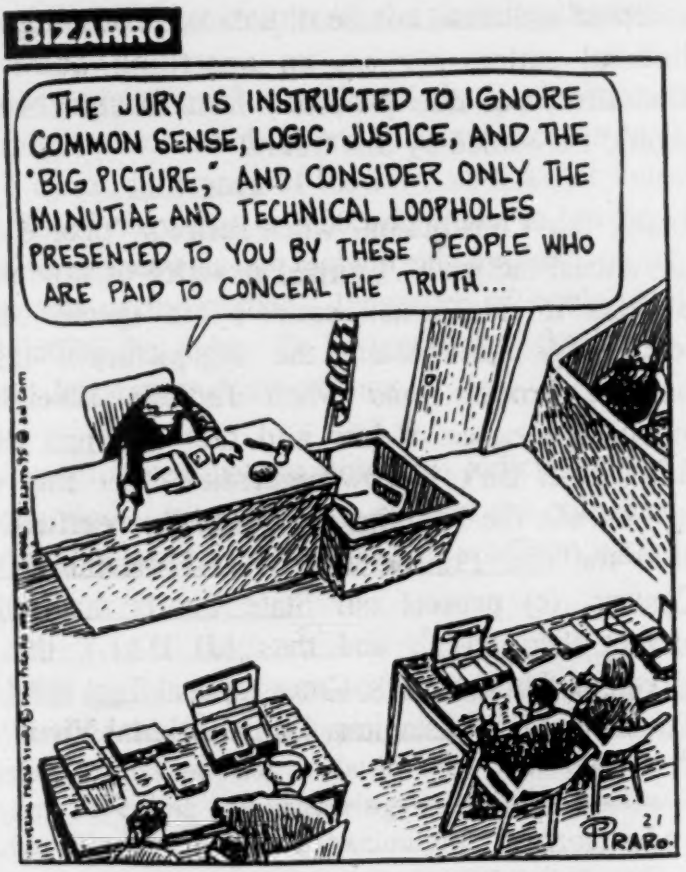
June 25, 1996

10 pp

TWO UNSETTLING QUESTIONS

Judgments are, as it were, the sayings of the law, and are **received as truth** [even if **not the truth**].[a]

Personally ashamed but constitutionally constrained by oath to support our Constitutions WE THE PEOPLE still honor, Counsel presents very **basic questions** raised by the judicial **truth as received** and judicial **satire as published**.


BIZARRO
THE JURY IS INSTRUCTED TO IGNORE COMMON SENSE, LOGIC, JUSTICE, AND THE "BIG PICTURE," AND CONSIDER ONLY THE MINUTIAE AND TECHNICAL LOOPHOLES PRESENTED TO YOU BY THESE PEOPLE WHO ARE PAID TO CONCEAL THE TRUTH...
PIRARO

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[a] *Judicia sunt tanquam juris dicta, et pro veritate accipiuntur. Bl. Dict.*, (6th ed.), p. 850. [*Emphasis added*].

Questions Presented for Review

1. When **Federal due process** mandates that every Court render its decision **on** subject matter for adjudication ("Subject Matter") based on law and fact ("Reality")--not on what appears to be so ("Appearance")--and when a State Court decision is, *per se*, **just the reverse** of what a **Constitutional** decision on Subject Matter would be if and when rendered, then isn't this **unsettling departure** by our entire State judiciary from accepted and usual course of judicial proceedings to the **judicial satire**, *per se*, an **unsettling question on Constitutional due process** which has not been, but should be, settled by this Court?

2. Under our Constitution, when **satire's** "people .. paid to conceal the truth" usurped **practice of law** and **due process** it aids, when **satire's** "to ignore common sense, logic, justice, and the 'big picture'.." usurped **judicial process**, and when **Judicial Inveiglement** and/or **ignorance of law and fact**[b] usurped **Rule of Law**, then isn't it now imperative that this Court: **(a) invoke** the Supremacy Clause; **(b) reaffirm** (*inter alia*) the Due Process and Equal Protection of Laws Clauses; **(c) protect** our State Courts that failed to protect themselves[c]; and thus **(d) HALT** the lethal spread of this invincible Constitutional Tort (42 U.S.C. §1983) that is a contagious **Constitutional Virus**?

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[b] An Extraordinary Preliminary Statement (page iii, *infra*).

[c] Judiciary indeed protected itself against a *pro se* litigant in *Sato* v. *Plunkett*, 154 F.R.D. 189 (N.D.Ill., 1994) and, likewise, against a practicing lawyer in *Garcia* v. *Silverman*, 70 Misc.2d 537 (Civ.Ct. N.Y. Co. 1972).

AN EXTRAORDINARY PRELIMINARY STATEMENT

The Subject Matter for adjudication that State Courts were **inveigled**[d] into escaping notice of is:

> deprivation without due process of petitioner's property right (admittedly vested) by respondents' corporate actions (admittedly *ultra vires*) and legalization thereof by State Courts--which **ignored** (and thus did not even render) a decision thereon.

Law on ignorance[e] is well settled, to wit: Ignorance of those things which one is bound to know excuses not. Thus, in civil cases, ignorance of the law, with a full knowledge of the facts, furnishes no ground, either in law or equity, to rescind agreements, or reclaim money paid, or set aside solemn acts of the parties. Ignorance of one's right does not prejudice the right. To be ignorant of the law is gross neglect. Ignorance of law excuses no one.

Counsel hopes that the **powerful** judicial policy maker may now find it inescapable to **reverse** the published satire as our **settled** judicial policy and thus **reaffirm** basic law on

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[d] **Artful (not lawful)** practice of law caused both law and fact on Subject Matter to escape notice of, and inveigle our trusting Courts into **not** rendering their decisions **on**, Subject Matter: **reversing (not rendering) substantial justice**.

[e] *Ignorantia eorum quæ quis scire tenetur non excusat.* Ignorantia *juris quod quisque tenetur scire, neminem excusat. Ignorantia juris sui non præjudicat juri. Ignorare legis est lata culpa. Ignorantia legis neminem excusat.* *Bl. Dict.*, (6th ed.), pp. 746-747.

due process that every Court take judicial notice of law and render its decision only on Subject Matter--

no matter ON WHAT, HOW ARTFULLY, and/or WITH WHAT ARROGANCE AND BRAZENNESS a lawyer argues: just to win--no matter what it takes.

Our **Chief Justice of United States** (world's best democracy) may now wish to envision the perpetual public implications of its **landmark** decision on entire legal process: worldwide. For, Counsel understands that:

> .. And he is considered the head of the legal profession in the United States. The chief justice is also the living symbol of the federal judiciary.[f]

This Court may wish to **reaffirm** timeless precedents settled by such luminaries as our **Great Chief Justice Marshall, Cardozo, C.J.**, and English **Lord Mansfield** who **Justice Marshall** relied on and reaffirmed (*infra*). For, the same English common law principles birthed, and still nurse, both American and Indian jurisprudence. In his May 5, 1995 letter (App. J, 38a-56a) to the **Chief Justice of India** (world's biggest democracy), Counsel begged Indian apex Supreme Court also to **reaffirm** (not reverse) its prior **landmark** decision. It protected its judiciary against practice of **arrogance** and **brazenness** calculated to deprive the Court of its **I**ntelligence, **I**ndependence, and **I**ntegrity: the Three Eyes of the **LAW**.

A powerless lawyer and his helpless petitioner, both seek forgiveness should this Court find frivolousness, brazenness, and/or arrogance in this unsettling petition.

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[f] *John J. Patrick*, The Young Oxford Companion to the SUPREME COURT OF THE UNITED STATES, O. U. P., N. Y., 1994, **Checks and balances**, pp. 63-65 at p. 64.

LIST OF PARTIES

Lawful parties are all named in the caption.

List of Unlawful Parties--As Satire's "Minutiae and Technical Loopholes"--to Insure Judicial Inveiglement (that Dwarfs Mere Brazenness and Arrogance)

Until April 30, 1996, Dockside at Tarrytown, Inc. ("Dockside") was in the restaurant business as a tenant of respondent Tarrytown Boat Club, Inc. ("TBC").

In 1991, under Westchester County Sup. Ct. Index No. 91-17656, Dockside filed a lawsuit *Dockside* v. *TBC, et al.* ("*Dockside*") to enforce its Lease with TBC.

Since early 1992, certain *TBC, et al.* respondents filed **15 (lost 13) demoralizing** lawsuits against Dockside, *et al.* as listed in letter Counsel obtained for benefit of this Court. (App. I, 29a-37a). Yet: with such *per se* frivolous lawsuits, TBC **drilled *Dockside* alive** in real life--just as 15 bullets shot from the hip would drill a human **alive** in real life.

Worse yet: artfully (not lawfully), *sua sponte*, TBC selectively imported into the proceeding **only** *Dockside* **but not** their above 15 lawsuits, **portrayed** *Dockside* as the **American Revolutionary War**, each respondent as the **patriotic General Washington**, and petitioner Schiffer (of course) as the **traitor Benedict Arnold** only because even though all respondents knew the same truth on Dockside's Subject Matter (Lease) in *Dockside*, only Schiffer stated on oath to aid due process (thus a traitor):

"the truth, the whole truth, and nothing but the truth".

Despite Schiffer's truth out of the bag, TBC still won in *Dockside*--the same as TBC won in *Schiffer*: case at bar.

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G June 22, 1994: Statement of Nature of Case, Procedural History, and Statement of Facts--included in Petitioner's Brief on Appeal to Supreme Court, Appellate Division, Second Department 17a

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I June 22, 1996: Letter from Alexander (Sandy) E. Treutler, Dockside at Tarrytown, Inc. enclosing his April 30th, 1996 Letter to Landlord Tarrytown Boat Club, Inc. regarding Lawsuits involving Lease dated March 4, 1991 that TBC and/or its Officers Filed against Dockside and/or its Officers (Sandy and/or His Spouse Jill Clark Tonnessen Treutler)--with Enclosure 29a

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ON PETITION FOR A WRIT OF CERTIORARI
TO NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully begs that a writ of certiorari issue to review the Order of the State of New York Court of Appeals entered on March 28, 1996.

OPINIONS BELOW

New York State Court of Appeals' Order dated March 28, 1996 denied petitioner's motion for reargument and is reproduced as Appendix A (App. A, 1a).

New York State Court of Appeals' Order dated January 16, 1996 dismissed, sua sponte, petitioner's appeal as of right and is reproduced as Appendix B (App. B, 2a).

New York State Supreme Court, Appellate Division, Second Judicial Department's Decision & Order dated December 15, 1995 denied motion for reargument of appeal and is reproduced as Appendix C (App. C, 3a).

New York State Supreme Court, Appellate Division, Second Judicial Department's Decision & Order dated September 25, 1995 affirmed the Decision/Order dated November 23, 1993 of Supreme Court, Westchester County) and is reproduced as Appendix D (App. D, 4a-6a).

Supreme Court, Westchester County's Decision/Order dated November 23, 1993 and entered November 26, 1993 is reproduced as Appendix E (App. E, 7a-13a).

STATEMENT OF JURISDICTION

Jurisdiction is invoked under 28 U.S.C. § 1257. It provides that a final judgment rendered by the highest court of a State may be reviewed by this Supreme Court by writ of certiorari where, *inter alia*, any title, right, privilege, or immunity is specially set up or claimed under the Constitution or statutes of the United States.

New York State Court of Appeals' order denying reargument was entered on March 28, 1996. (App. A, 1a). This petition is timely filed on or before June 26, 1996: within 90 days after March 28, 1996. *Rule* 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES

A. United States Constitutional Provisions

U. S. Constitution (in relevant parts) provides as follows:

> 1. No State shall ... pass any ... Law impairing the Obligations of Contracts,....

U.S. Const. Art. I, cl. 10, sub-cl. 1 ("Contracts Clause").

> 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. Art. IV, § 2, cl. 1 ("Privilegs and Immunities Clause").

> 3. ...This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; .... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2 ("Supremacy Clause").

> 4. ... and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; ...

U.S. Const. Art. VI, cl. 3 ("Support Clause").

> 5. No person shall be...deprived of...life, liberty, or property, without due process of law; ....nor shall private property be taken for public use without just compensation.

U.S. Const. Amend. 5 ("Due Process Clause").

> 6. .. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. 14 § 1 ("Priviliges and Immunities, Due Process, and Equal Protection of Laws Clauses").

B. United States Statutory Provisions

U. S. Statutes (in relevant parts) provide as follows:

> 7. **(a) Statement of equal rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State .. to make and enforce contracts, .. and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, .. exactions of every kind, and to no other.
>
> **(b) "Make and enforce contracts"**
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) **Protection against impairment**

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 ("Equal rights under the law").

8. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States .. to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ..

42 U.S.C. § 1983 ("**Civil action for deprivation of rights**": a "**Constitutional Tort**" committed under **Color of Law**, *Bl. Dict.* (6th ed.), p. 1489).

9. (2) **Obstructing justice**; ..

; .. or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State .. with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) **Depriving persons of rights or privileges**.

If two or more persons in any State .. conspire, .. for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or for

> the purpose of preventing or hindering the constituted authorities of any State .. from giving or securing to all persons within such State .. the equal protection of the laws; .. in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercised any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985 ("**Conspiracy to interfere with civil rights**").

C. New York State Constitutional Provisions

N. Y. S. Constitution (in relevant parts) provides as follows:

> 10.
>
> § 3a. The jurisdiction of the court of appeals shall be limited to the review of questions of law ..
>
> § 3b. Appeals to the court of appeals may be taken .. [i]n civil cases and proceedings as follows:
>
> (1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, ..

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable [as of right] under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. .. Such an appeal shall be allowed when required in the interest of substantial justice.

N.Y.S. Const., Art. VI (Judiciary) § 3.

11.

§ 28a. The chief judge of the court of appeals shall be the chief judge of the state of New York and shall be the chief judicial officer of the unified court system. ..

N.Y.S. Const., Art. VI (Judiciary) § 28.

12.

§ 33. Existing provisions of law not inconsistent with this article shall continue in force until repealed, amended, modified or suspended in accordance with the provisions of this article. The legislature [not the court] shall enact appropriate laws to carry into effect the purposes and provisions of this article, and may, for the purpose of implementing, supplementing or clarifying any of its provisions, enact any laws, not inconsistent with the provisions of this article, necessary or desirable in promoting [not perverting] the objectives of this article.

N.Y.S. Const., Art. VI (Judiciary), § 33.

13.

§ 1. [Oath of office; .. .. for public office.]

Members of the legislature, and all officers, executive and judicial, ... shall, ... take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of ...., according to the best of my ability;" .. ..

N.Y.S. Const., Art. XIII (Public Officers), § 1.

D. New York State Statutory Provisions

14. NY CPLR (in pertinent parts) provides as folows:

§ 215. The following actions shall be commenced within one year: .. ..

3. an action to recover damages for .. libel, slander, false words causing special damages, ..

NY CPLR § 215(3).

§ 217.

1. Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner, .. or after the respondent's refusal, upon the demand of the petitioner .., to perform its duty; ..

NY CPLR § 217(1).

§ 3211.

(a) **Motion to dismiss cause of action.** A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ..

2. the court has not jurisdiction of the subject matter of the cause of action; or ..

5. the cause of action may not be maintained because of .. .. statute of limitations, or statute of frauds; or ..

NY CPLR § 3211(2) and (5).

§ 3212. **Motion for summary judgment.**

(a) **Time; kind of action.** Any party may move for summary judgment in any action, after issue has been joined.

(b) **Supporting proof; grounds; relief to either party.** .. Ther motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. .. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

(c) **Immediate trial.** If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the

grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper.

..

(e) **Partial summary judgment; severance.** .. In any other [non-matrimonial] action summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct:

1. that the cause of action as to which sumary judgment is granted shall be severed from any remaining cause of action; or

2. that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

(f) **Limitation of issues of fact for trial.** If a motion for sumary judgment is denied or granted in part, the court, by examining the papers before it and, in the discretion of the court, by interrogating counsel, shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purposes in the action. The court may make any order as may aid in the disposition of the action.

NY CPLR § 3212(a), (b), (c), (e), and (f).

§ 4511. **Judicial notice of law.**

(a) **When judicial notice shall be taken without request.** Every court shall take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state, .. or jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state except those that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts.

(b) **When judicial notice may be taken without request; when it shall be taken on request.** Every court may take judicial notice without request of private acts and .. .. ; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States; and .. .. Judicial notice shall be taken of matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or .. .., but a court may require or permit other notice.

(c) **Determination by court; review as matter of law.** Whether a matter is judicially noticed or proof is taken, every matter specified in this section shall be determined by the judge or referee, and included in his findings or charged to the jury. Such findings or charge shall be subject

to review on appeal as a finding or charge on a matter of law.

(d) **Evidence to be received on matter to be judicially noticed.** In considering whether a matter of law should be judicially noticed and in determining the matter of law to be judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether offered by a party or discovered through its own research

NY CPLR § 4511(a), (b), (c), and (d).

STATEMENT OF THE CASE

Simply stated, case at bar involves practice of **Judicial Inveiglement** and/or **ignorance of law and fact**: a new **Constitutional Virus** ("CV").

Appearance of settled law on Statute of Limitations ("Appearance") that CV created caused the State Courts to repeatedly throw out petitioner's first three causes of action as time-barred. (App. D, 4a-6a at 5a).

Quite to the contrary, reality of settled law thereon is that petitioner had the choice between an Article 78 proceeding (within four months which he did not choose) and plenary action which he timely commenced ("Reality").

Federal questions are thus raised by the plethora of resulting draconian consequences of such CV in which our State Courts were deliberately deprived of their Constitutional power and duties to render judicial decisions on admitted Subject Matter for adjudication ("Subject Matter"). As a result, our State Courts threw out of Court

petitioner's first three causes of action that is the Subject Matter in dispute thus not adjudicated upon:

as if our entire Constitution itself ceased to exist.

For, it is settled law on Federal due process that all litigants alike have the constitutionally protected basic right to be rendered (thus to receive) a judicial decision on Subject Matter based on: Reality--not Appearance--thereof.

A. Statement of Material Facts

Statement of material facts is as follows:

(a) STATEMENT OF NATURE OF CASE (App. G, 17a-18a) and STATEMENT OF FACTS (App. G, 18a-21a)--as stated by petitioner's prior counsel; and

(b) NATURE OF CASE (App. H, 22a-24a) and STATEMENT OF FACTS (App. H, 24a-28a)--as stated by respondents' counsel.

In order to keep the argument simple, concise, and direct, Counsel lists facts that are material to the consideration of the questions presented on the Subject Matter for adjudication as follows:

(a) Incorporated on July 29, 1908, corporate respondent Tarrytown Boat Club, Inc. ("TBC") is now a **landmark** in Tarrytown with over 80 years of existence; has no parent or subsidiary; is a not-for-profit club formed under the then New York Membership Corporation Law as a membership corporation (**not a stock corporation**). (App. K, 57a).

(b) Any and all corporate actions that TBC took in violation of, *inter alia*, its Constitution and By-laws are *ultra vires*: as a matter of law and fact. Relevant provisions of TBC's Constitution and By-laws that, *inter alia*, were admittedly violated and directly involve the questions presented are included as Appendix L (App. L, 58a-61a; also App. G, 17a-21a at 18a-21a).

(c) In November 1990, petitioner Schiffer was elected as the Commodore: the apex TBC official. By virtue thereof, he was the Chairman of Board of Governors ("Board"). (App, L, 58a).

(d) By November 1991, Schiffer had logged thirty years of membership of TBC and held various elected offices.

(e) In November 1991, Schiffer was the one and only Board member who (based on twenty-five years of membership in good standing) had acquired a vested property interest in his TBC membership for life:

(i) that was subject to no annual elections and no payment of annual membership dues; and, also,

(ii) that is DESIGNATED A "TWENTY-FIVE YEAR MEMBERSHIP" THAT CAN BE REMOVED ONLY BY A TWO-THIRD VOTE AT ANY REGULAR CLUB MEETING (App. L, 60a: Art. X, Sec. 4) -- AS OPPOSED TO REMOVAL OF A REGULAR MEMBER AT ANY BOARD OF GOVERNORS MEETINGS ONLY SUBJECT TO RATIFICATION OF REGULAR CLUB MEETING. (App. L, 60a-61a: Art. XII, Sec. 3)

(f) On April 22, 1991, at a Regular Club members' meeting, respondent Kenealy's motion asking for a vote to distribute club-owned shares in a for-profit corporation TARRYTOWN MARINA, INC. ("TMI Shares") to each Regular member was seconded by all seven other Board members. Commodore Schiffer tabled the motion and respondent Kenealy called him a "shit commodore" (App. H, 24a-25a; App. K, 57a).

(g) On November 3, 1991, at a Special Board meeting, respondents suspended petitioner but notice of this Special Meeting was given only after November 1, 1991: less than at least 72 hours (three days)--in open, blatant, and calculated violation of TBC Constitution and By-laws. Art. IX, Sec. 4 (Board of Governors Meetings--mandating at least 72 hours notice); and Art. X, Sec. 4 ("Twenty-five Year Membership"--prohibiting such action in case of Schiffer except at a Regular Club--not Board--meeting).

(h) On November 4, 1991, notice was posted and letters sent to TBC membership and petitioner announcing petitioner's suspension and for considering his expulsion at yet another Special Meeting to be held on November 11, 1991: also in violation of TBC Constitution. (para. (g), *supra*; also Art. XII, Sec. 3 (Suspension and Expulsion). (App. L, 59a-61a).

(i) On November 11, 1991, by corporate action taken at that Special meeting, respondents then expelled petitioner from TBC: also in violation of TBC Constitution (*ultra vires* corporate actions, *supra*).

(j) No Regular Club meeting of TBC membership was ever held at which his "twenty-five year membership"

was dropped. (Art. X, Sec. 4--Twenty-five Year Membership). (App. L, 60a).

(k) Worse yet: no Regular Club meeting of TBC membership was ever held at which even his *ultra vires* expulsion was considered, ratified, or voted upon. Art. IX, Sec. 4 (Board of Governor Meetings) and Art. XII, Sec. 3 (Suspension and Expulsion). (App. L, 59a-61a).

(l) QUITE IRONICALLY: after all of the above conspired corporate actions were taken with ulterior motives and that too, *per se*, *ultra vires*, respondents then as a matter of factly stated that--

> "No action, within the 4 month period provided for in CPLR Article 78 was ever taken by petitioner, nor did he ever request that the membership, in any capacity, review the determnination to expel him. (R.235-239)." (App. H, 27a-28a).

B. Stage in the Proceedings at which Federal Questions were Raised

Fraud is odious, and not to be presumed.[1]

That is why, despite Counsel's exposé of such manifest fraud on court documented in respondents' briefs-on-oath, State Courts ignored same and assumed that they rendered their decisions on Subject Matter--nothing else.

---

[1] *Fraus et odiosa et non præsumenda.* *Bl. Dict.* (6th ed.), p. 663.

No Federal questions were raised until this Counsel was first substituted after Appellate Division, Second Department affirmed the partial summary judgment dated November 23, 1993 of the Court of first instance (App. E, 7a-13a): by its Decision & Order rendered on September 25, 1995. (App. D, 4a-6a).

However, as a matter of law and fact, NY CPLR 4511 mandates that, [even] without request, every Court take judicial notice of law. *Per se*, then, had State Courts taken foregoing mandated judicial notice of law (the plethora of applicable Constitutional and Statutory Provisions stated in this petition, *see* pp. 3-12), State Courts would not have been inveigled by CV into ignorance of law and fact. These Federal questions would not have been raised by their decisions after decisions without judicial notice of law.

Petitioner's prior Counsel was helpless and petitioner penniless. For the first time, on October 25, 1995, this Counsel made the following statement in petitioner's motion to reargue filed with the Second Department:

> "7. Not brought to its attention, it escaped notice of the Court that, *per se*:
>
> (a) the plaintiff's contract-based rights and privileges as an elected member and commodore etc. created by state law (*infra*) are property rights; and, thus,
>
> (b) the aforesaid truth is also tantamount to deprivation of those property rights that are secured by the **Fourteenth Amendment** to the U. S. Constitution -- without **due process** SINCE it was **not** "**for cause**".

By order dated December 15, 1995, Second Department denied reargument, with $100 costs but no opinion. (App. C, 3a).

Counsel then raised the following omnipotent **Federal question** raised by Fraud as one that merits review:

> Is the constitutional purpose of **Federal due process** reinvented and reversed in New York State overturning settled law of the land to the contrary **when**, *per se*:
>
> (a) settled law on **Federal due process** secured under both **Fifth** and **Fourteenth Amendments** to our **U. S. Constitution** mandates that every court render its decision only on the **subject matter of the suit for adjudication**[2]; and, yet,
>
> (b) Court's decision (even if non-final) is only on a judicial fairy tale **instead**--and thus a reversible constitutional error that this Court may wish to correct and finally render its first ever decision on Admitted Subject Matter in case at bar?

Court of Appeals reaffirmed dismissal of petitioner's appeal as of right:

> (a) insofar as taken against defendant Thomas Kenealy--upon the ground that as to that defendant the order appealed from does not

---

[2] *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (1877).

finally determine the action within the meaning of the Constitution; and

(b) otherwise--upon the ground that no substantial constitutional question is directly involved.

(App. A, 1a and App. B, 2a).

Now, this petition is premised on a plethora of extraordinary and compelling Federal questions under 28 U.S.C. § 1331, to wit: a plethora of such questions on each and every Constitutional and Statutory Provision listed in this petition, including (but not limited to) an unprecedented question on 42 U.S.C. § 1983 that involves judicial decisions based on what appeared to be settled law ("Appearance") when, *per se*, the reality of that settled law was (and still is) just the reverse ("Reality").

That is why, by definition, judgments in case at bar are thus **not** the sayings of the law and are **not received as truth** when, quite to the contrary, they are instead the sayings of a lawyer(s) who inveigled[3] our Courts into rendering judgments that Courts **should not have rendered**[4]: until judicial notice of law was taken as mandated--**even without request**. *NY CPLR* 4511.

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[3] To "inveigle" means to lure or entice or lead astray, by false representations or promises, or other deceitful means.

Bl. Dict., (6th ed.), p. 824.

[4] This is being published as a warning to all members of the Bar. Henceforth, any attorney who submits papers to this court which deliberately .... withholds information to inveigle the court into making a decision it should not make, will be held in contempt of court and the papers together with all the pertinent facts will

REASONS FOR ALLOWING THE WRIT

Simply stated: amongst others, there are two main reasons for allowing the writ.

First and foremost: it will HALT the spread of the new **Constituional Tort** (42 U.S.C. § 1983) as a **Constitutional Virus**--before it is too late. For, CV STOPS Courts from rendering their decisions on Subject Matter in dispute for adjudication based on settled law and admitted fact--no ifs, ands, or buts.

Second: it will give back our New York State judiciary its Eyes that they were deprived of by that CV and, hopefully, petitioner may still live to receive a Constitutional decision on Subject Matter after all, to wit: his unconstitutional deprivation of admittedly vested property interest in his twenty five year membership of the TBC (a **landmark** in Tarrytown). Indeed, petitioner possesses medical and other evidence of how these deprivations have literally destroyed him and his family's life style after 30 years of living with that institution--only to be ridiculed by a lawyer born to win (not practice law) and named **traitor Benedict Arnold** in public papers that posterity will witness: sooner or later.

Petitioner lost everything and is left with nothing to lose. Our sacrosanct institution lost everything but is still immortal. Petitioner and Counsel beg allowing the Writ.

---

be submitted to the Grievance Committee ... for appropriate action.

Garcia v. *Silverman*, 70 Misc. 2d 537-38 (Civil Ct. N.Y.Co. 1972). [*Emphasis added*].

I

State Courts Failed to Protect Themselves Against Newly Created Constitutional Virus, to wit: Judicial Inveiglement and/or Ignorance of Law and Fact

Law on **due process** is well settled:

> To give such proceedings [under Constitutional due process of law and judicial process] any validity, there must be a tribunal competent by its constitution .. to pass upon the subject-matter of the suit [provided that tribunal indeed passes upon that subject matter based on settled law and admitted fact on that subject matter--nothing else]; .. ..[*Emphasis added*].

Pennoyer v. *Neff*, 95 U.S. 733, 24 L.Ed. 565. (1877) ..

State Courts relying on a plethora of authorities listed in the decisions (App. E, 7a-8a at 8a; App. D, 5a) and dismissed as time-barred the first through third causes of action pursuant to CPLR §3211(a)(5) insofar as they sought to annul determinations made on November 3 and 11, 1991. In so doing, Courts relied on respondents' Counsel:

> 36. Even if plaintiff had a meritorious claim for damages due to an improper suspension and/or expulsion, he cannot establish such a claim without first establishing that the suspension and/or expulsion were improper; which he cannot do without bringing on an Article 78 proceeding.
>
> 37. Only after he obtained such a determination could he then proceed with an action for damages. Plaintiff is now seeking to combine this necessary two-step approach into one; however, this court does not have

> jurisdiction to rule on the first step--whether or not the suspension and/or expulsion were proper as plaintiff failed to commence such an action within the applicable statute of limitations.
>
> 38. Absent a timely challenge, the suspension and/or expulsion, remain in force and are *ipso facto* proper action by the Board of Governors of defendant TBC. As such, plaintiff's first, second and third causes of action must be dismissed as a matter of law.

(Appendix F, 14a-16a at 16a). [*Emphasis added*].

It is universal common knowledge:

TWO WRONGS DON'T MAKE A RIGHT.
NEITHER DOES THE THIRD.

Quite to the contrary, Courts failed to take judicial notice (thus escaped notice) of settled law on deliberate choice of plenary action by plaintiffs as follows:

> There is a line of cases, it is true, in which mandamus has been declared the exclusive means of recovering monetary claims but in which the defendants (or respondents) have been independent administrative boards or commissions such as water or sewer district commissioners **rather than** corporate or similar entities. These special boards serve the public through their own right and not as agents of municipal corporations, a distinction which the cases had carefully maintained prior to the recent integration of the various prerogative writs into the present article 78. **As this distinction is one of substance rather than procedure it has validity in the present case**. (See *People ex rel. Desiderio* v. *Conolly*, 238 N.Y.326, at pp. 331-332, wherein the earlier decisions of *People ex rel. Farley* v. *Winkler*, 203 N.Y.445, and *Holroyd* v. *Town of Indian Lake*, 180 N.Y. 318, are limited per **Cardozo, J.**).**

> While the express purpose of article 78 being only to liberalize the handling of the various writs of certiorari to review, mandamus and prohibition and to reduce to a minimum the technicalities of practice (**) the changes effected must be considered procedural and should not be taken to represent any substantial extension or contraction of the classic substantive principles underlying these ancient remedies. By this token article 78 cannot be interpetrated as excluding an action at law in a heretofore appropriate case. We believe this action to represent such a case.

Toscano v. *McGoldrick*, 300 N.Y. 156 at 161-162 (Ct. App. 1949), cited with approval in *Sorensen* v. *City of New York*, 99 F.Supp. 411 at 417 (USDC, SDNY, 1951) and also in *Matter of Chase* v. *Boisvert*, 78 Misc. 2d 1061, 1063, 1064-65 (Sup. Ct. NY Co. 1974). [*Emphasis added*].

> The challenge to the use of the article 78 proceeding is without merit [facts, thus the challenge, are just the reverse in case at bar]. It is true that the petitioners might have brought an action at law for damages for breach of the written undertaking ... The petitioners declined to do so and if there is a basis for both an article 78 proceeding and some other form of action, the petitioners are entitled to choose the one they think is most suitable. Certainly, neither form is exclusive. (*Toscano* v. *McGoldrick*, 300 N.Y. 156; cf. 8 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 7801.02, subd. [4]) nor for that matter does an improper form of action preclude relief. (CPLR 103).
> **
> .. it is dubious that in this article 78 proceeding which is in reality bottomed upon breach of a written agreement, the court should impose the short Statute of Limitations rather than the contract Statute of Limitations. "In applying a Statute of Limitations *** 'We look for the reality, and the essence of the action

> and not its mere name'." (*Noel* v. *Interboro Mut. Ind. Ins. Co.*, 31 A.D.2d 54,55; citing *Morrison* v. *National Broadcasting Co.*, 19 N.Y.2d 453, 459; see, also, *Brick* v. *Cohn-Hall-Marx Co.*, 276 N.Y. 259; *Licari* v. *Isbrandtsen Co.*, 31 A.D.2d 791). The reality, of course, is a breach of contract and the four-month statute should not apply.

Matter of Chase v. *Boisvert*, 78 Misc. 2d 1061, 1063, 1064-65 (Sup. Ct. NY Co. 1974). [*Emphasis added*].

It is manifest that respondent TBC is **not** a municipality (as litigant was in *Toscano* and in the plethora of authorities State Courts relied on). As stated in *Toscano*, TBC is a not-for-profit corporation and, as stated in *Matter of Chase*, TBC Constitution and By-laws are written corporate agreements that were deliberately breached by respondents **to get rid of Schiffer**: **by hook or by crook**. That is why Schiffer was called a **traitor** for **telling the truth** during due process in *Dockside*? That is why *Dockside* letter Counsel obtained aids this Supreme Court in considering what that crucified family begs under our Rule of Constitution, to wit:

> In separate litigations involving TBC but with different adversaries, it is entirely different (almost invariably mutually contradictory) statements of facts for the same one set of transactions in real life at the Club and my restaurant. Short of a judicial investigation in each one of these over 15 lawsuits, no human can aid a Court to administer law to real life actions.
>
> Should the Court take interest in considering what you are asking it to consider, only then there may be some judicial relief. Otherwise, we have given up: in perpetuity.

> Thanks for your interest in using in your brief: my **real life satire** that is just like **Schiffer**'s and the **published satire** that you shared with me some time ago.

(App. I, 35a).

Respondents successfully evaded a judicial decision on admitted Subject Matter and, thus, Court's decision **legalized the sad satire** (my then daughter-in-college sent me just to jest with her lawyer-dad who was just a corporate ERISA/TAX lawyer not even lawyering in Courts of Law) to be the law in New York: *per se*, **reversing** Federal due process as if our Constitution itself has ceased to exist.

Respondents thus first coerced Schiffer out of his admittedly vested property rights by *ultra vires* corporate actions. Respondents then coerced him out of legal due process as well (*supra*) by inveigling our State Courts into not taking judicial notice (thus escaping notice) of settled law on choice of plenary action in case of a corporation and its individual fiduciaries. Courts escaped notice of the fact that TBC is not a municipality or a government and, thus, Article 78 proceeding is not the exclusive remedy: more so in the case at bar in which *ultra vires* and unlawful actions were deliberately taken by design and then Court asked to legalize same as correction thereof was time-barred after four months. *Per se*, this is a runaway system at work.

II

Self-Evident Practice of Judicial Inveiglement and/or Ignorance of Law and Fact Prevented Courts from Rendering a Decision on Subject Matter

Practice of Judicial Inveiglement and/or ignorance of law and fact is self-evident from the following as well:

Respondents used such **rhetoric** as **petitioner Schiffer** was the **traitor Benedict Arnold** as documented in NATURE OF THE CASE. (App. H, 22a-24a at 23a; also, see p. v, *supra*). Material facts establish just the reverse.

Practice of law[5] degenerates into an invincible winning advocacy (thus Judicial Inveiglement) when **winning zealous representation within the bounds of law**[6] becomes **winning zealous witness with no bounds at all**[7].

---

5 [Practice of law is t]he rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent [regardless of which adversary wins based on fact and law]. [*My emphasis*].
R. J. Edwards, Inc. v. *R. L. Hert*, Okl., 504 P.2d 407, 416.

6 An attorney does not have the duty to do all and whatever he can that may enable him to win his client's cause or to further his client's interest. His duty and efforts in these respects, although they should be prompted by his "entire devotion" to the interest of his client, must be within and **not without the bounds of the law**. [*My emphasis*].

Our apex Court may also wish to recognize the **perpetual global implications** of its new ground-breaking decision: if and when rendered.

Petitioner looks up to this Supreme Court now to help protect his constitutionally protected **Federal due process rights** to a decision on **admitted Subject Matter** and thus on his vested property right (*supra*). Any other decision is a defiled decision in violation of **Civil Rights Law** caused by respondents telling fairy tales under color of law during due process, converting Courts of Law into Courts of Deception, and thus violating a plethora of Constitutional and Statutory provisions listed in this petition.

In fact, these manifest violations (with judicial approval) become precedents as a plethora of those Constitutional and Statutory provisions: **just reversed**.

In re Wines, 370 S.W.2d 328, 333 (Mo. 1963); See Note, 38 Texas L. Rev. 107, 110 (1959).

> The fact that it desired to **evade the law**, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can **if you do not pass it** .... It is a matter of proximity and degree as to which minds will differ....". [*My emphasis*].

Superior Oil Co. v. *Mississippi*, 280 U.S. 390, 395-96 (**Justice Holmes** 1930).

[7] > An untechnical term denoting a witness, on the trial of a cause, who manifests a partiality for the side calling him, and **an eager readiness to tell anything which he thinks may be of advantage to that side**. [*My emphasis*].

Bl. Dict. (6th ed.), p. 1618.

It may be time now for us to face the truth that no known human practice of a profession (licensed or not) is more degrading than that licensed practice of law in which lawyers **blind** their own Creators:

just to win, no matter what it takes.

This Supreme Court may be aided by the following settled law on **judicial process** and **judicial jurisdiction**:

> Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist. [*Emphasis added*].

Matter of Berkowitz v. *Arbib & Houlberg*, 230 N.Y. 261, 274 (**Cardozo**, J., **Ct App** 1921).

> Neither legislature nor executive [nor judiciary (State or Federal) nor lawyer] is above law.

Marbury v. *Madison*, 1 CRANCH 137, 149 (**Marshall, C.J.**, S. Ct. 1803).

> Neither fiction nor presumption prevails over fact [and law].

Ryan v. *Motor Credit Co., et al.*, 23 A.2d 607, 622 (N. J. Ct of Chancery, 1941), relying on *Johnston* v. *Smith*, 2 Burrow 962, 97 Eng. Rep. 654 (**Lord Mansfield**, 1265).

> .. *Stare decisis* [more so, established precedents] is at least the everyday working rule of our law. (p.20) .. The sentence of today will make the right and wrong of tomorrow. .. (p.21). [*Emphasis added*].

Cardozo, Benjamin N., *The Nature of the Judicial Process* (1921 *Classic*), 1991 Paperback Edn., pp. 20-21.

> *Stare decisis et non quieta movere*. To adhere to precedents, and not to unsettle things which are established. *Ballard County* v. *Kentucky County Debt Commission*, ... 162 S.W.2d 771, 773.

Bl. Dict. (6th ed.), p. 1406.

CONCLUSION

Petitioner prays that a writ of certiorari should be issued to review the opinion and order of the New York State Court of Appeals. Counsel begs for a settling answer that will **reverse** the **judicial trends** from **petrifying** into **administering** law and from rendering decisions **off** Subject Matter to **on** Subject Matter.

Dated: June 25, 1996

Respectfully submitted,

LALIT K. JAIN
Counsel of Record for Petitioner
61-22 Booth Street
Rego Park, N. Y. 11374-1034
718 476-9757

APPENDIX A

March 28, 1996: NY State Court of Appeals -- Order Denying Reargument

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-eighth day of March 1996

PRESENT, Hon. Judith S. Kaye, *Chief Judge, Presiding.*

Mo. No. 290

Andrew Schiffer,
Appellant,

v.

Tarrytown Boat Club, Inc., &c., et al.,
Respondents.

A motion having heretofore been made upon the part of the appepllant for reconsideration of this Court's January 16, 1996 dismissal order, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX B

January 16, 1996: NY State Court of Appeals -- Order Dismissing Appeal as of Right

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of January 1996

PRESENT, Hon. Judith S. Kaye, *Chief Judge, Presiding.*

Mo. No. 31 SSD 4

Andrew Schiffer,

Appellant,

v.

Tarrytown Boat Club, Inc., &c., et al.,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal, in so far as taken against defendant Thomas Kenealy, be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that as to that defendant the order appealed from does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the appeal otherwise be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

s/Donald M. Sheraw
Clerk of the Court

Appendix C

December 15, 1995: NY State Supreme Court, Appellate Division, Second Judicial Department -- Decision & Order Denying Motion for Reargument

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

8638S
Y/cs

ALBERT M. ROSENBLATT, J.P.
MYRIAM J. ALTMAN
EDWARD J. HART
WILLIAM D. FRIEDMAN, JJ.

94-00277
Andrew Schiffer, appellant v
Tarrytown Boat Club, Inc., etc.,
et al., respondents.

DECISION & ORDER
ON MOTION

Motion by the appellant for reargument of an appeal from an order of the Supreme Court, Westchester County, dated November 23, 1993, which was determined by decision and order of this court dated September 25, 1995, and for an award of summary judgment in his favor.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

ROSENBLATT, J.P., ALTMAN, HART and FRIEDMANN, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

December 15, 1995
SCHIFFER v TARRYTOWN BOAT CLUB, INC.

Appendix D

September 25, 1995: NY State Supreme Court, Appellate Division, Second Department -- Decision & Order Affirming Supreme Court, Westchester County, Summary Judgment dated November 23, 1993 Dismissing the First, Second, Third, Fourth, and Seventh--But Not Fifth, Sixth, and Eighth Causes of Action

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

9234Q
Y/hu

_____AD2d_____ Submitted - June 20, 1995

ALBERT M. ROSENBLATT, J.P.
MYRIAM J. ALTMAN
EDWARD J. HART
WILLIAM D. FRIEDMAN, JJ.

94-00277

DECISION & ORDER

Andrew Schiffer, appellant v
Tarrytown Boat Club, Inc., etc.,
et al., respondents.

Michael H. Sussman, Goshen, N.Y., for appellant.

In an action for injunctive relief and to recover damages, *inter alia*, for defamation, the plaintiff appeals

from so much of an order of the Supreme Court, Westchester County (Colabella J.), dated November 23, 1993, as granted those branches of the defendants' motion which were for summary judgment dismissing the first, second, third, fourth, and seventh causes of action.

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff, Andrew Schiffer, commenced this action seeking injunctive relief and to recover damages, *inter alia*, for defamation against Tarrytown Boat Club, Inc., a not-for-profit corporation, and certain members of the club's board of directors. The plaintiff alleged, amongst other things, that the defendants violated the constitution and bylaws of the boat club by suspending and expelling him from the club without good cause. The plaintiff also alleges that the defendants libeled him by posting a notice of his suspension and possible expulsion on the club's bulletin board.

The Supreme Court properly dismissed the causes of action seeking injunctive relief. The claims which contest the suspension and expulsion of the plaintiff for failure to follow the constitution and bylaws of the boat club are properly reviewable in a proceeding pursuant to CPLR article 78 since an incorporated not-for-profit corporation is subject to mandamus (*see*, *Sines v Opportunities for Broome, Inc.*, 156 AD2d 878, 879; *Matter of Paglia v Staten Is. Little League*, 38 AD2d 575). Consequently, pursuant to CPLR 217(1), these causes of action are time-barred by the four-month limitation period for proceedings pursuant to CPLR article 78.

Upon review of the notice announcing the plaintiff's suspension and possible expulsion from the boat club, we find that the notice was true in its entirety because the plaintiff had been suspended by the club and was being considered for possible expulsion. The notice was therefore not defamatory since truth is an absolute defense to e libel action (*Licitra v Faraldo*, 130 AD2d 555; *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, *rearg denied* 42 NY2d 1015, *cert denied* 434 US 969).

The plaintiff's remaining contentions are without merit.

ROSENBLATT, J.P., ALTMAN, HART and FRIEDMANN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

September 25, 1995
SCHIFFER v TARRYTOWN BOAT CLUB, INC.

Appendix E

November 23, 1993: NY State Supreme Court, County of Westchester -- Decision/Order upon Defendants' Motion for Summary Judgment

SHORT ORDER FORM
SUPREME COURT -- STATE OF NEW YORK
COUNTY OF WESTCHESTER

To Commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

PRESENT:
HON.
NICHOLAS COLABELLA
J.S.C.

----------X

ANDREW SCHIFFER,

Plaintiff,

-against-

TARRYTOWN BOAT CLUB, INC., and its BOARD OF DIRECTORS individually, JOHN MILLAR, KEVIN McDERMOTT, ROBERT ROSSI, EDWARD THOMAS, DONALD BRAINARD, THOMAS KENEALY, ANTHONY ISMAILOFF, and JOHN PUFF,

Defendants.

----------X

DECISION / ORDER

INDEX NO. 3379/92

MOTION DATE 8/6/93

PLC

The following papers numbered 1-10 were read on this motion by defendants to dismiss and for sanctions; cross-motion by plaintiff for partial judgment.

Pages Numbered

Notice of Motion/Order to Show Cause --Affidavits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5-7
Answering Affidavits	8
Replying Affidavits	9

Motion insofar as it seeks to dismiss is decided, as follows:

The first through third causes of action are dismissed pursuant to CPLR §3211(a)(5). These claims, which contest the suspension and expulsion of plaintiff for failure to follow the Constitution and By-laws of the Boat Club and lack of good cause, are reviewable in an article 78 proceeding (Sines v. Opportunities For Broome, Inc., 156 AD2d 878, 879; Caso v. NYS Public School Athletic Assn., 78 AD2d 41; Matter of Paglia v. Staten Island Little League, Inc., 38 AD2d 575; Vanderbuilt Musuem v. American Associations of Musuems, 113 Misc2d 502, 508-509). The four-month limitation period for article 78 proceedings provided in CPLR §217(1) is applicable in this case even assuming, arguendo, the claims could also be asserted in a plenary action as palintiff contends (see, Press v. County of Monroe, 50 NY2d 695; Solnick v. Whalen, 49 NY2d 224; cf Pauk v. Board of Trustees of City University of New York, 119 Misc2d 663, 669, modified 111 AD2d 17, aff'd, as modified 68 NY2d 702). The action, commenced in April 28, 1992, insofar as it seeks to annul determinations made on November 3 and 11, 1991, therefore, is time-barred.

The fourth cause of action is dismissed pursuant to CPLR §3212. The notice posted as to plaintiff's

suspension and possible expulsion was truthful in that plaintiff had been suspended by the Boat Club and was being considered for possible expulsion, and, therefore, not defamatory (Rinaldi v. Holt, Rinehart & Winston, 42 NY2d 369). By a parity of reasoning, there is no basis for liability under plaintiff's alternative interpetration of the claim as false words causing special damages.

The fifth and sixth causes of action are dismissed pursuant to CPLR §§3212 and 3211(a)(5) insofar as they are based on the statement by defendant Kenealy that plaintiff was a "shit commodore". Such statement constituted non-actionable opinion (neither objectively true nor false) based on disclosed facts (plaintiff's tabling of defendant's motion at a Board meeting) (Steinhilber v. Alphonse, 68 NY2d 283, 289-295; William v. Varig Brazillian Airlines, 169 AD2d 434). The claims, insofar as they are based on this statement, are also untimely since they were not asserted within one year of its making on April 22, 1991 as required by CPLR §215(3). The Court rejects plaintiff's contention that the claims are timely because the statement was republished by defendants in the minutes of the Board of Governors' meeting in May and June, 1991. There is no evidence that defendant Kenealy had anything to do with the republication (Karaduman v. Newsday, 51 NY2d 531, 540). A review of the minutes makes clear that any "republication" was simply done in the normal course of reporting and confirming the events of the prior meetings and in the context of discussing possible disciplinary action against defendant Kenealy which plaintiff advocated. There is no evidence that the republication at the later meetings was done with malice.

Motion insofar as it seeks to dismiss the fifth and sixth causes of action based on statements by defendant Kenealy

that plaintiff was an "incompetent architect", "ruining the boat club" and failing "to properly supervise rehabilitation of the boat club" is denied without prejudice to renewal following the completion of discovery. While the Court agrees with defendant that the statements appear to be qualifiedly privileged, and that this shifts the burden to plaintiff to establish malice, plaintiff has not had an opportunity to depose defendant Kenealy (although such examination was requested). Consequently, it is unfair to find at this juncture that plaintiff has not met his burden of proof [see, CPLR §3212(f)].

In addition, while the terms "incompetent," "ruining" and "properly" do appear to convey a subjective assessment of plaintiff's performance that is not necessarily true or false, the record is unclear as to the actual context for the remarks. Opinion is only nonactionable if accompanied by a recitation of the facts upon which it is based[1] or if it does not imply that it is based upon undisclosed facts (Steinhilber, supra at 289). Neither party at this time has addressed the issue of context in their affidavits. Plaintiff's affidavit has only dealt specifically with the "shit commodore" comment. Defendants' counsel merely assumes for the purpose of the motion that the statements were made. Consequently, the Court cannot find either that the underlying facts for defendant's opinion were disclosed or that, given the context of the remarks, an average listener would draw no inference of undisclosed facts.

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1 But see, Silsdorf v. Levine, 59 NY2d 8 and O-Neil v. Peekskill Faculty, 120 AD2d 36, 46, holding that damage for defamation may be recoverable where plaintiff can demonstrate the falsity of the underlying facts.

The seventh cause of action is dismissed pursuant to CPLR §§3211(a)(2) and 3212. Plaintiff failed to pursue the administrative remedies provided in the Constitution and By-Laws for redress against another member. Article XIII, §2 permitted plaintiff to file a complaint with the Club Secretary or by personal appearance before the Board of Governors in the event the Board on its own failed to take the initiative with respect to defendant Kenealy. Article II, §1 entitled plaintiff, with at least two other members, to protest any adverse decision by the Board by having the matter submitted to the Club membership which could have overturned the Board's decision. Plaintiff has advanced no reason for having failed to pursue such remedies for incidents occurring between May and September, 1991 prior to his suspension and expulsion in November, 1991.[2] Thereafter, such remedies became unavailable to him upon being expelled which, in turn, became a fait accompli, as discussed above, upon his failure to pursue timely reiew of his expulsion.

The eighth cause of action is dismissed puruant to CPLR §3212. The statement in the document entitled "1991 review", that "every time the then commodore had a communication process with the Village Engineer, the to-do list seemed to grow", would be understood by the average reader as opinion of the author by reason of the context of the statement in the review, the word "seem", and the preface to the review "(i)n our opinion.". Plaintiff has not

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2 Defendant Kenealy's conduct on April 22, 1991 and possible expulsion was ultimately considered by the general membership at a special meeting of the membership, regardless of action taken in the interim by the Board of Governors, and the membership voted not to take action against defendant.

shown any basis to find the statement was intended to be understood as an assertion of fact or an opinion based on undisclosed facts (Steinhilber, supra at 293).

The statement on its face is also not defamatory. The tenor of the review conveys irritation by the author with the increasing "to do" list and appears to attribute this in part to plaintiff, but the statement does not constitute, as plaintiff alleges, a disparaging comment on plaintiff's professional competence. The fact that "to do" list grew is an exhibition of competence by plaintiff and/or the Village Engineer in ensuring the correction of violations (which insures to the benefit of the Boat Club's patrons). Finally, there has been no showing by way of competent admissible evidence that defendants are responsible for the review and defendants specifically deny such responsiblity.

Motion insofar as it seeks sanctions is denied. Notwithstanding the lack of merit to many of plaintiff's claims, the Court does not regard the action as frivolous as defined in CPLR R 8303-a.

Cross-motion is denied for the reasons discussed above with respect to plaintiff's motion.

Counsel shall appear for a Preliminary Conference, at the Courthouse, Room 1618, to schedule the remainder of discovery on December 16, 1993 at 2.00 p.m. There shall be no further motions without leave of Court.

Dated: White Plains, New York
November 23, 1993.

s/Nicholas Colabella
NICHOLAS COLABELLA
Supreme Court Justice

LAW OFFICES OF MICHAEL H. SUSSMAN
Attorney for Plaintiff
25 Main Street
Goshen, New York 10924

TORINO & SINGER, P.C.
Attorney for Defendants
250 Old Country Road, Suite 501
Mineola, New York 11501-4264

Appendix F

May 31, 1995: Letter from Respondents' Counsel to Appellate Division, Second Department enclosing Page 13 to Counsel's Affirmation in Support of Motion for Summary Judgment Apparently Omitted from the Record on Appeal--with its Enclosure

TORINO & SINGER, P.C.
Attorneys at Law
250 Old Country Road
Suite 501
Mineola, New York 11501-4264
516 747-4301

May 31, 1995

VIA FACSIMILE (718) 858-2446

Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11201
Attention: Neil Esposito

RE: ANDREW C. SCHIFFER, vs.TARRYTOWN BOAT CLUB, INC., and its BOARD OF DIRECTORS individually, JOHN MILLAR, KEVIN McDERMOTT, ROBERT ROSSI, EDWARD THOMAS, DONALD BRAINARD, THOMAS KENEALY, ANTHONY ISMAILOFF, and JOHN PUFF
Our File Number: 506-504584
DOCKET NUMBER: 94-00277

Dear Mr. Esposito:

Enclosed herewith please find a copy of Page 13 to my affirmation in support of defendant's motion for Summary Judgment which apparently was omitted from the Record on Appeal.

Thank you for your courtesy and cooperation in this matter. Should you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

s/-

BRUCE A. TORINO

BAT:ms
Enclosure

cc: MICHAEL H. SUSSMAN, ESQ.
25 Main Street
Goshen, New York 10924

plaintiff acknowledges not to have so commenced. See SCHIFFER transcript Exhibit H, p.114 - 118.

36. Even if plaintiff had a meritorious claim for damages due to an improper suspension and/or expulsion, he cannot establish such a claim without first establishing that the suspension and/or expulsion were improper; which he cannot do without bringing on an Article 78 proceeding.

37. Only after he obtained such a determination could he then proceed with an action for damages. Plaintiff is now seeking to combine this necessary two-step approach into one; however, this court does not have jurisdiction to rule on the first step--whether or not the suspension and/or expulsion were proper as plaintiff failed to commence such an action within the applicable statute of limitations.

38. Absent a timely challenge, the suspension and/or expulsion, remain in force and are *ipso facto* proper action by the Board of Governors of defendant TBC. As such, plaintiff's first, second and third causes of action must be dismissed as a matter of law.

III. FOURTH CAUSE OF ACTION

39. The fourth cause of action seeks damage for libel in that the defendants posted "notices of plaintiff's suspension and expulsion in plain view of plaintiff's numerous guests and the general public".

A. CPLR Article 78

Appendix G

JUNE 22, 1994: STATEMENT OF NATURE OF CASE, PROCEDURAL HISTORY, AND STATEMENT OF FACTS--INCLUDED IN PETITIONER'S BRIEF ON APPEAL TO SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

STATEMENT OF NATURE OF CASE

Plaintiff/Appellant brought the case below for redress of breach of contract and defamation by Defendant/Respondents Tarrytown Boat Club and certain members of its Board of Directors, including principally Thomas Kenealy.

Procedural History

Plaintiff/Appellant filed his Complaint on or about February 14, 1992, and served all of the Defendatns herein between April 27, 1992 and June 4, 1992. (Appendix at R-11, R-67 to R-76).[1] Defendants/Respondents thereafter Answered together on July 2, 1992. (R-89). Plaintiff noticed many depositions which were consistently ignored by the Defendants. (R-411).

Thereafter, Defendants/Respondents jointly moved for summary judgment on or about April 7, 1993. (R-3). Plaintiff/Appellant cross-moved for partial summary judgment on or about May 14, 1993. (R-393). The Honorable Nicholas Colabella, S.C.J., rendered a decision

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[1] The Appendix containing the Record on Appeal is submitted herewith. Hereinafter, references to pages in the Appendix will be abbreviated as "R-____."

granting partial summary judgment to the Defendants/Respondents on November 26, 1993. (R-465, 470). Thereafter, Plaintiff/Appellant noticed the instant appeal on December 23, 1993. (R-473).

STATEMENT OF FACTS

Plaintiff/Appellant had been a member of the Tarrytown Boat Club for nearly thirty years and was elected its Commodore in November 1990. (R-413). As Commodore, Plaintiff/Appellant was a member of the Board of Governors of the Tarrytown Boat Club. Plaintiff/Appellant continued in good standing until the time he was suspended and ultimately expelled, illegally, in November 1991. (R-394).

The Tarrytown Boat Club is an incorporated not-for-profit club organized according to a Constitution and By-laws. (R-36; see R-355 to 367 (Constitution and By-laws)). Pertinent provisions of the Constitution and By-laws as it existed in November 1991 include the following:

> Article I, Sec. 4 -- Object -- The object of this Club shall be to encourage the sport of boating, seamanship and navigation, to provide a suitable Club and anchorage for the recreation and use of its members, to preserve the scenic beauty and natural advantages of the Hudson, to render all possible civil service and developments to Tarrytown, to promote good fellowship and cooperative privileges among its members.

(R-358).

> Article X, Sec. 3 -- Regular membership -- The Regular Membership is the sustaining membership with every right and privilege.

(R-364).

Plaintiff/Appellant swore in his affidavit dated May 13, 1993, that Thomas Kenealy made comments about him in a manner which was profane, nasty and personally insulting to Plaintiff/Appellant, and contrary to the Constitution of the Tarrytown Boat Club, yet Defendants/Respondents all stood by and refused to take any action to address this conduct on the part of Mr. Kenealy. (R-417). Plaintiff/Appellant also took the proper administrative steps within the framework of the Defendant/Respondent Boat Club's rules to have Mr. Kenealy disciplined for his conduct, to wit, he submitted a complaint to the Vice Commodore, John Millar. (R-228 to R-233, 417). Yet, Plaintiff/Appellant's application was ignored, and Mr. Kenealy was allowed, nay, emboldened, to continue his personal attacks on Plaintiff/Appellant into the Fall of 1991, much to Plaintiff/Appellant's distress, physical and emotional. (R-417).

On November 3, 1991, the Tarrytown Boat Club Board of Governors met and voted to suspend Plaintiff/Appellant. This meeting was held pusuant to notice provided to members of the Board of Governors sometime after November 1, 1991, and less than 72 hours before the meeting so called. (R-419).

Plaintiff/Appellant, as a member of the Board of Governors was entitled to notice at least 72 hours in advance of the meeting held, but did not receive such notice at his house until the afternoon of November 3, 1991.

(R-419). Plaintiff/Appellant did not receive actual notice of the meeting until after it had taken place. (R-419).

Thereafter, a notice dated November 4, 1991, was posted and distributed announcing Plaintiff/Appellant's suspension and announcing a meeting to consider his possible expulsion at a Special Meeting to be held November 11, 1991. (R-308).

Article IX, Section 3 of the Constitution and By-laws states that:

> A Special Club Meeting may be called by the Board of Governors or when ten or more members serve written notice on the Commodore or Secretary stating business to be transacted. * * *

(R-364).

On November 11, 1991, a Special Meeting of the membership of the Tarrytown Boat Club was held at which the membership voted to expel Plaintiff/Appellant. (R-419). Plaintiff/Appellant received a letter dated November 13, 1991, informing him he was expelled. (R-419). The reasons cited by the Defendants/Respondents for suspending and expelling Plaintiff/Appellant (R-426), do not come within those provided by the Constitution and By-laws, which state that the Tarrytown Boat Club may suspend or expel a member for "objectionable insobriety, immorality, profanity, abuse of officers or other undesirable mannerisms or practices." Article XIII, sec. 9 (R-366).

Article XII, Section 3 of the Constitution and By-laws states that:

> The Board of Governors has full authority to suspend any member for any breach of By-laws but

must submit to ratification of regular Club meeting for expulsion.

(R-365).

No regular meeting of the membership of the Tarrytown Boat Club was ever held at which Plaintiff/Appellant's expulsion was considered, ratified or voted upon. (R-419).

Appendix H

NOVEMBER 15, 1995: NATURE OF THE CASE AND STATEMENT OF FACTS-- INCLUDED IN RESPONDENTS' MEMORANDUM OF LAW ANNEXED AS EXHIBIT A TO COUNSEL'S AFFIRMATION IN OPPOSITION TO PETITIONER'S REARGUMENT BEFORE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

NATURE OF THE CASE

This is a case about grown boys, their clubhouse, and the goings on at their club meetings. It involves an organization which owns, as part of the property upon which its "club" is located, a restaurant. The club leases the restaurant space like any landlord leases its property. The lease benefits both parties in that the club has a restaurant on location for its club members and the restaurant has a pool of patrons on location for its business. As occasionally will happen in landlord-tenant relationships, the club and the restaurateur have a falling out. The restaurateur elects to sue the club and names the members of the board of governors individually.

As this is going on, there is a personality conflict taking place on the board of governors of the club; between the Commodore and the House Chairman. This results in a verbal altercation (name calling) which leads to the Commodore attempting to suspend and expel the House Chairman (tell mommy and daddy), but he is thwarted by the board of governors (mommy and daddy) which reinstates the House Chairman after he apologizes to the Commodore (say you're sorry and play nicely). At this

point the restaurateur initiates his lawsuit and the board of governors meet to go over their strategy in the litigation with the restaurateur.

The board decides, as litigants often do, to defend against the claims in the lawsuit and the board members agree among themselves to form a united defense and not to discuss the case with the restaurateur. The board members all sign an agreement that they will not assist the restaurateur in any way with his lawsuit. The Commodore then meets, not once but a number of times, with the lawyers representing the restaurateur and concludes by signing an affidavit which is used in an order to show cause against the club. The board of governors, viewing the Commodore much like General Washington viewed his good friend General Benedict Arnold after the latter turned the keys to West Point over to the British during a disputre between this country and Great Britain, decided they no longer wished to associate with this traitor[1] and took the necessary steps to expel him.

The Commodore, refusing to face reality and believing his expulsion was not the desire of the majority, began this action to seek re-instatemnt as a member of a club which does not wixh to associate with him after he "sold it down the river." Make no mistake about it, it is quite evident upon reviewing the affidavit given by the Commodore that his thirty pieces of silver for giving the affidavit was the opportunity to turn it into a personal attack against the

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[1] The British were known as the "redcoats" during the Revolutionary War because of their red uniforms; the Continental Army wore whatever they could find but the officers wore mainly blue. Hence the derivation of the word "turncoat" for a traitor.

House Chairman he came to so despise. The membership voted the Commodore out but now the Commodore says they did so at a specially called meeting and not a regular meeting. In an effort to worm his way back into the club, the Commodore sues it.

STATEMENT OF FACTS

In early 1991 the plaintiff-appellant was Commodore of the Tarrytown Boat Club (hereinafter "TBC"). As such he was a member of the TBC's Board of Governors. The various defendant-respondents herein were also members of the TBC's Board of Governors. Defendant-respondent KENEALY, in addition to being a member of the Board of Governors was the House Chairman and a former Commodore of the club.

A major project undertaken in 1991 was renovation of the TBC's restaurant and bar which came under the purview and responsibility of defendant-respondent KENEALY as House Chairman. The Commodore of the TBC, being an architect by profession, took it upon himself to personally oversee the renovations.

At the regular members' meeting on April 22, 1991, defendant-respondent KENEALY made a motion, seconded by seven other board members, relating to the issuance of shares in TBC to its members. This motion was unrelated to the renovations being undertaken at the time, although this was an existing irritation between the plaintiff-appellant and defenant-respondent KENEALY. This motion resulted in a lengthy discussion and, rather than put the motion to a vote, plaintiff-appellant, then Commodore, improperly tabled the motion. It is at this point defendant-respondent KENEALY called the Commodore a "shit commodore." A

comment made more than a year prior to the institution of the instant action.

On April 26, 1991, at what is believed to be the instigation of plaintiff-appellant, twelve members of the TBC served written notice to plaintiff-appellant asking for a special meeting to consider expelling defendant-respondent KENEALY from the TBC for use of profanity and slanderous statements. (R. 118) Presumably in response thereto, on April 27, 1991, plaintiff-appelant, without notice to or concurrence of the Board of Directors, sent a letter to defendant-respondent KENEALY suspending him from the TBC for abuse of the Commodore, profanity, and slander against the Commodore and on the same date the plaintiff-appellant called a special meeting for May 9, 1991 to consider the suspension of defendant-respondant KENEALY. (R. 120)

Plaintiff-appellant undertook this ultra vires action knowing full well that he did not have the support of, nor the authority of, the Board of Governors to take such an action. (R. 147-153) Upon learning of the action intended by Commodore Schiffer, on May 2, 1991 a special Board of Governors' meeting was held to review the issue of the suspension of defendant-respondent KENEALY by the plaintiff-appellant, Commodore SCHIFFER. After much discussion, it was voted that the suspension be rescinded, defendant-respondent KENEALY be asked to apologize, and a letter of reprimand be sent to defendant-respondant KENEALY. Consistent therewith, on May 3, 1991 an apology was delivered by defendant-respondant KENEALY. (R.377-381)

The issue of renovations to the clubhouse again surfaced and sometime in the end of September, 1991, the

entity renting the restaurant from the TBC, to wit, DOCKSIDE AT TARRYTOWN, INC. (hereinafter referred to as *DOCKSIDE*) initiated litigation against the TBC, in the Supreme Court, Weschester County, captioned "*DOCKSIDE AT TARRYTOWN, INC.* vs. *TARRYTOWN BOAT CLUB, INC. et al.*" under Index Number 91-17656.

In light of this, on October 9, 1991 a special meeting of the Board of Governors was called to discuss this litigation. Several members of the Board were concerned that a member or members of the Board of Governors might be aiding the DOCKSIDE in the litigation against TBC. To ensure that each member of the Board was aware of where their loyalties should lie and to ensure that a united front was maintained for this litigation, each attested to the following:

1) no member of the Board will participate in any discussions with the Dockside and/or its attorneys pertaining to the litigation;

2) no member of the Board will conspire with the Dockside to aid and abet the litigation; and

3) no member of the Board has provided any information to the Dockside and/or its attorneys regarding the Septemeber 23, 1991 meeting of the Club.

Present at this meeting was the plaintiff-appellant herein, ANDREW SCHIFFER who subscribed his name to this resolution, dated 9 October 1992. (R. 290-294)

In spite of his position of trust as Commodore, and without notification to any of the members of the Board of Governors, on October 30, 1991, the plaintiff-appellant

herein signed an affidavit knowing that the same would be submitted on behalf of the DOCKSIDE in its litigation against the TBC. (R. 296-302) A cursory review of the annexed affidavit demonstrates that the allegations made therein are no more that personal attacks on defendant-respondent KENEALY.

As a result of this affidavit a special meeting of the Board of Governors was held on November 3, 1991 and the plaintiff-appellant was suspended for violating his fudiciary responsibility to the TBC and its members; effectively entering into litigation against the club in violation of its by-laws; and endangering the welfare of the TBC by his actions. (R. 304-306)

A product of that meeting of the Board of Governors was that on Novermber 4, 1991 a letter was sent to the General Membership informing it of plaintiff-appellant's suspension and a meeting was scheduled for November 11, 1991 to consider plaintiff-appellant's expulsion from the TBC. (R. 308) On the same date, a letter was sent to the plaintiff-appellant informing him of his suspension and the November 11 meeting. A notice of the meeting was also posted in the private meeting room of the Club. (R310)

On November 11, 1991, at a special meeting of the regular members of the TBC the issue of plaintiff-appellant's conduct was undertaken and upon the vote of 43 to 13, with 2 abstentions, the charges against plaintiff-appellant were sustained and plaintiff-appellant was forthwith expelled from the TBC.

Of significan note is that on November 13, 1991, a letter was sent to the plaintiff-appellant informing him of his expulsion. No action, within the 4 month period

provided for in CPLR Article 78 was ever taken by plaintiff-appellant, nor did he ever request that the membership, in any capacity review the dtermination to expel him. (R.235-239)

Plaintiff-appellant's full treachery and deceit was not known at the time and has only now come to full light. As a result of a conflict between counsel for DOCKSIDE and its client a motion to be relieved as cousel was made. A copy of that motion, which included the timeslips of work performed by that firm is included in the record. (R.312)

It is only upon review of those timeslips that the full measure of Plaintiff-applellant's betrayal of his position of trust and authority can be appreciated. Plaintif-appellant's conduct was not an isolated incident, but an intentional and continuous course of conduct, without notice to the Board of Directors of the TBC.

Appendix I

June 22, 1996: Letter from Alexander (Sandy) E. Treutler, Dockside at Tarrytown, Inc. enclosing his April 30th, 1996 Letter to Landlord Tarrytown Boat Club, Inc. regarding Lawsuits involving Lease dated March 4, 1991 that TBC and/or its Officers Filed against Dockside and/or its Officers (Sandy and/or His Spouse Jill Clark Tonnessen Treutler)--with Enclosure

June 22nd, 1996

By Fax

Lalit K. Jain, Esq.
Counsel for Andrew C. Schiffer Expelled from
Tarrytown Boat Club, Inc.
61-22 Booth Street
Rego Park, NY 11374-1034

Re: *Andrew C. Schiffer* v. *Tarrytown Boat Club, Inc., et al*
Petition for Writ of Certiorari with the Supreme Court

Sub: List of 15 Lawsuits TBC Filed Against Dockside and/or its Officers but Lost 13 Lawsuits--Under Penalty of Perjury, Declared As True, Correct, and Complete to the Best of My Knowledge and Belief

Dear Mr. Jain:

Please refer to our discussions from time to time on Dockside lawsuits involving Dockside's Lease with TBC dated March 4, 1991. At your last-minute request for help in completing your Petition for Writ, I have compiled to the best of ability the following list for your use.

You will file this letter to further aid the Court in becoming fully aware of the plethora of demoralizing lawsuits that TBC filed and drove Dockside out of our thriving restaurant business in open and blatant breach of our March 4th, 1991 lease as I stated in my April 30th, 1996 letter to TBC (copy enclosed).

Open and blatant abuse of legal processes by lawyers is self-exposed based on TBC **winning only 2** but **losing balance 13** (total 15 lawsuits TBC filed) categorized below:

HOW WON / LOST	TBC WON	TBC LOST
By Court Decision	2	9
By Settlement	0	1
By TBC Laches: TBC to Withdraw	0	3
TOTAL 15	**2**	**13**

THE LISTING

Sl. #	Date / Index # / Court	Title of Action / Cause of Action	Status
1	Feb. 92 / None/ Village Justice Court	*John Malandrino* v. *Alexander Treutler & Matthew Malec*, *Dockside* / TBC instructed plaintiff to sue Dockside and recover its bills for repairing flood damage that TBC Officers authorized repairs on Oct 28 and 29, 1991.	Ct. Dec. / TBC WON

2	Jun. 92 / 7511/92 Sup. Ct. W/chestr Cy.	*TBC* v. *Empire Cruise Line* "*Dockside may be an appropriate party to this action*" / A motion to enjoin Empire's cruise boats from docking at Dockside's guest dock and thus **blocked** both restaurant and catering business that came to Dockside	Ct. Dec. / TBC WON
3	Apr 93 / N/A / Village Justice Court	*TBC* v. *Dockside* / Eviction for concocted default of Lease	Dec. / TBC LOST
4	May 93 / 9284/93 / Sup. Ct. W/chestr Cy.	*John H. Millar* v. *Alexander E. Treutler* / Millar sued Dockside for not serving drinks to TBC Official with alcoholic problem and a DWI conviction--even though such refusal is in compliance with statutory mandate that is enforced by Alcoholic Beverage Control Board, etc.	Dec. / - TBC LOST
5	Aug 93 / 14933/93 / Sup. Ct. W/chestr Cy.	*TBC* v. *Dockside* / TBC sued to stop Dockside from using its cabaret license in his restaurant business	Dec. / TBC LOST

6	Jan 94 / N/A / Village Justice Court	*TBC* v. *Dockside* / Eviction for December 93 rent paid 1 day late due to Bank error	Dec. / TBC LOST
7	Jan 94 / N/A / Village Justice Court	*TBC* v. *Dockside* / Eviction for January 94 rent not even late yet	Dec. / TBC LOST
8	Nov 94 / N/A / Village Justice Court	*TBC* v. *Dockside* / Eviction for rent .. .. details with lawyer Sussman	Dec. / TBC LOST
9	Mar 95 / 95-4903 / Sup. Ct. W/chestr Cy.	*John H. Millar* and *Kevin McDermott* v. *Alexander E. Treutler* / Two TBC Officials sued Sandy for libel based on Sandy's report of their Criminal Mischief first to Police Department and later to the Village Clerk.	Laches / TBC TO WITH-RAW
10	May 95 / N/A / Village Justice Court	*TBC* v. *Dockside* / TBC sued for injunction against Dockside to turn over leased premises for some TBC Opening Day Function	Dec. / TBC LOST
11	Jan 16 96 /	*TBC* v. *Dockside* / Eviction for late payment of rent for	Dec. /

	N/A / Village Justice	Jan 96	TBC LOST
12	Jan 96 / N/A / Village Justice Court	*TBC* v. *Dockside* / Eviction for 4 prior years' back taxes TBC never invoiced at all and demanded full payment at once.	Settled / TBC LOST agreed to take instlmnt
13	Apr 96 / N/A / Village Justice Court	*TBC* v. *Dockside* / Eviction for missing copy of third party liability policy--produced by Dockside	Dec. / TBC LOST
14	May 1 96 / N/A / Village Justice Court	*TBC* v. *Dockside* / Eviction for rent .. .. Dockside **Could Not Take It Any More**. By its April 30, 1996 letter, Dockside just let go--*infra*.	Moot/ TBC to W/draw
15	May 3 96 / N/A / Village Justice Court	*TBC* v. *Dockside* / Eviction for improper renewal of lease for second five year term .. .. Dockside **Could Not Take It Any More**. *See Item #14.*	Moot/ TBC to W/draw

After four years of legal torture, I learnt my lesson. It is sad that Courts are themselves helpless before the very

lawyers they gave birth to and nurse so that they aid their Creators to respect--**not ridicule**--law and Constitution.

In my cases, TBC's two powerhouses are as follows:

1. SCHEFFLER, KING & CASPAR, ESQS.
   40 Radio Circle, P.O.Box 117
   Mt. Kisco, New York 10549-0117
   Tel: 914 666-2311
   [UNTIL END OF 1995 OR SO]

2. McCULLOUGH GOLDBERGER & STAUDT
   81 Main Street
   White Plains, New York 10601
   Tele: 914 949-5921
   [SINCE BEGINNING OF 1996 OR SO]

That is why, despite having duly renewed our second five year term of our Lease, we LET GO our restaurant business itself: deprived of our basic right to make a living by frivolous lawsuits. Also: we are now looking to find and pay another $2,000 to yet another lawyer to file for corporate bankruptcy.

Even our present lawyer MICHAEL H. SUSSMAN, ESQ., 25 Main Street, Goshen, New York 10924 (Tel: 914 294-3991 and Fax: 914 294-1623) stopped representing us for our inability to pay an additional about $800 in his fees.

Adding insult to injury, we also await yet another lawsuit from our previous lawyers MARONEY PONZINI & SPENCER, 14 North Broadway, Tarrytown, New York 10591 (Tel: 914 631-1176 and Fax: 914 631 2382) for our inability to pay an additional about $25,000 in their fees.

Mr. Jain, we understand the underlying basic common sense principle on which your brief is premised. We can only pray to GOD at this time.

For, just as Schiffer could not be protected by his lawyer against TBC's third invincible powerhouse TORINO & SINGER, so also we could not be protected against TBC's two other invincible powerhouses.

In separate litigations involving TBC but with different adversaries, it is entirely different (almost invariably mutually contradictory) statements of facts for the same one set of transactions in real life at the Club and my restaurant. Short of a judicial investigation in each one of these over 15 lawsuits, no human can aid a Court to administer law to real life actions.

Should the Court take interest in considering what you are asking it to consider, only then there may be some judicial relief. Otherwise, we have given up: in perpetuity.

Thanks for your interest in using in your brief: my **real life satire** that is just like **Schiffer's** and the **published satire** that you shared with me some time ago.

I hope my letter helps you and the Court to see how:
When lawyers appear, realitities disappear.
What would be our source of income now?
What do we do to face the real truth in real life?

Very truly yours,
s/-
Alexander E. Treutler
enc

(Enclosure to Appendix I)

Letterhead
Dockside at Tarrytown, Inc.
World-class jazz • Opposite Tarrytown RR •
Directly on the Hudson River
236 West Main Street P.O.Box 634 Tarrytown NY 10591
1 914 631-2888
"Creative Dishes--The Music is Terrific" ....
The New York Times **[3 Stars] Gannet**

April 30, 1996: Letter from TBC's Tenant Dockside Restaurant to its Landlord Tarrytown Boat Club, Inc. regarding its Lease dated March 4, 1991 and TBC's Demoralizing Law Suits Against Dockside and Judicially Coerced Eviction

April 30th, 1996

By certified mail--receipt number: Z 072 499 930

Tarrytown Boat Club, Inc.
P.O.Box 432
Tarrytown, NY 10591

Dear Landlord,

Our lease agreement dated March 4th, 1991 requires key money of $50,000 by April 30th, 1996 for the second five year term of the lease, which we duly renewed.

As a result of a multitude of litigation that you kept winning and we kept losing, I am unable to make that payment. Therefore, and because

- of your past orchestrated actions which caused a significant loss of business, and
- your lawyer's written warning that you will sue us again to achieve eviction, and
- because this makes it the eleventh (11^{th}) law suit by you and your officers against us

we, personally, are leaving in a few days without waiting for another demoralizing eviction notice from you directing me, or my wife, Jill Clark Tonnennen Treutler, to vacate.

Yours truly,

s/-

Alexander E. Treutler
Dockside at Tarrytown, Inc.

Copy: Law Offices of Michael H. Sussman

Appendix J

May 5, 1995: Letter from Lalit K. Jain, Attorney At Law (New York and India), to The Hon'ble Chief Justice A. M. Ahmadi, Supreme Court of India, New Delhi, India--with Certain Enclosures

LKJ

♦ Experienced C'mmonSense → Benefiting Clients℠ ♦

LALIT K. JAIN
ATTORNEY AT LAW*
Fon/Fax: 718 476-9757

* New York and India (Bihar)

61-22 Booth Street ♦ Rego Park ♦ NY 11374-1034 ♦ USA

May 5, 1995

The Hon'ble Chief Justice A. M. Ahmadi
Supreme Court of India
Tilak Marg, New Delhi 110 001, INDIA.

Sub: Intent to Submit My *Amicus Curiae* in the V. C. Mishra Case--Now Before the Constitution Bench for a Redecision

Ref: Frontline ♦ Vol. 12 ♦ No.8 ♦ April 8-21, 1995 ♦ Pages 50-51 and 52 Published at the *National Press*, Kasturi Buildings, Madras - 600 002

Pages 50-51: The Judiciary -- **In contempt** The judge vs the lawyer

Page 52: A Profession on Trial -- by Indira Jaising, Senior Advocate

Hon'ble Chief Justice Ahmadi:

With due respect to the Court, I respectfully submit that I am an attorney and counsellor at law admitted to the bar in New York (1978) and in the U. S. Supreme Court (1982). I am also enrolled as an advocate in the Bihar State Bar Council in India (1975). I am now a U. S. citizen practicing law in New York. Today, I called (38 8942 → 38 1635 → 38 1379) at about 1.00 A.M. NY time, was told that no redecision had been made on the global omnipotent question so conclusively decided by Justice Sawant, and, thus, I stated that I will mail, latest by May 31, 1995, my *amicus curiae* to aid in that redecision:

Whether the Supreme Court has the power to suspend an advocate from practice?

The Omnipotent Global Question Calls For An Inevitable Global Solution

The legal profession is on trial in India, in the U. S., and even in England where it all evolved based on the English common law principles. Just two days ago, the worst *mores* of the day were expressed by Judge J. Robert Elliott in Columbus, Georgia--now 85, the oldest fully active federal district judge in the country--in the following words:

> "Attorneys are servants of the law, rather than servants of the highest bidder [the client]," the court said. "We must rediscover the old values of our profession." Since then, federal district judges in Georgia, Missouri and Illinois have ruled similarly.

Wall Street Journal, Wednesday May 3, 1995, at A1, col. 6, and A6, col.2.

Suspecting fraud in court, these simple words just flowed out of the jurist's mouth, based on the winning advocacy on behalf of DuPont (the multi-billion dollar global giant incorporated in Delaware) in its case involving its tainted fungicide that wiped out thousands of acres of crops and plants! The crystal-clear message from this life-long jurist is not to be taken lightly.

Just to Win No Matter What it Takes

In India, the advocate's best efforts to persuade the court to acquiesce with his argument (that the judge admit the case) turned into brazenness and arrogance (articles marked A1-A3, A3).

In the U. S., the same efforts in my two cases escalated an outrageous fraud on the trial court into a calculated inveiglement of the entire N. Y. State judiciary: the courts rendered decisions after decisions based on pure fiction, not fact (forgotten) and law (petrified).

I know that both the above are fatal constitutional diseases that are contagious and would leave our entire legal jurisprudence with no legs to stand on: due process is dead process. That is why, meeting the conditions of my privileged memberships, I decided to submit to the Supreme Court in India my *amicus curiae* (enclosing a copy of my *sui generis* extraordinary writ of inveiglements (*infra*) under Rule 20.1 of the U. S. Supreme Court Rules (marked A4-A5)) after I submit, latest by May 25, 1995, my writ (enclosing a copy of my *amicus curiae*) to the U. S. Supreme Court here.

For, jurisprudence in both countries is based on the same English common law principles and, in today's information age and global environment, it is now inevitable that, no matter which country it is:

> "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective." Canon 1, The Model Code of Judicial Conduct (August 1990), the American Bar Association.

A. The Petition Filed by the Supreme Court Bar Association in India: Judicial History Obligates, Not Just Supports, an Unequivocal "YES" Answer to the Question

To help expedite matters before I submit my papers, I enclose copies of the decisions of the N. Y. State Court of Appeals (the Court of last resort in the State) tracing the authorities for control over barristers in England (who are not officers of the court) and attorneys in the U. S. [and, presumably, in India] (who are such officers of the court).

> Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards (*Selling v. Radford*, 243 U. S. 46;...). Whenever the

> condition is broken, the privilege is lost. ... For these reasons courts have repeatedly said that disbarment is not punishment (*Ex parte Wall*, 107 U. S. 265; ...). "The question is," said **Lord Mansfield**, "whether, after the conduct of this man, it is proper that he should continue as a member of a profession which should stand free from all suspicion" (*Ex parte Brounsall*, Cowp. 829). "It is not," he continued, "by way of punishment; but the court, on such cases, exercise their discretion whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not." .... The order of disbarment should be affirmed.

Matter of Rouss, 221 N.Y. 81, 84, 85, 91 (**Cardozo, J.**, N. Y. State Court of Appeals 1917). (marked A6-A11).

> In so holding we place power and responsibility where in reason they should be. No doubt the power can be abused, but that is true of power generally. In discharging a function so responsible and delicate, the courts will refrain, we may be sure, from a surveillance of the profession that would be merely odious or arbitrary. They will act considerately and cautiously, mindful at all times of the dignity of the bar and of the resentment certain to be engendered by any tyrannous intervention. ... In the long run, the power now conceded will make for the health and honor of the profession and for the protection of the public. If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work.

People Ex. Rel. Karlin v. *Culkin*, 248 N. Y. 465, 479-80 (**Cardozo, C. J.,** N. Y. State Court of Appeals 1928). (marked A12-A20).

B. My Extraordinary Writ of Inveiglements to the U. S. Supreme Court is in My Capacity as an Officer of the Court

In my two cases here, the attorneys' winning efforts turned into calculated **inveiglements** of the entire State judiciary including the N. Y. State Court of Appeals in one case.

> To inveigle a person ... is to seduce..., to entice..., not by force, but by some art, some device, some representation which is essentially false, and calculated to secure action on the part of the person [the judges in my cases] sought to be inveigled; to secure his [the judges'] acquiescence ....

In re Kelly, 46 F. 653, 655 (Circuit Court, D. Oregon, 1890). (marked A21-A25).

> The word "inveigle" is defined to be to persuade to something bad; to wheedle; to entice; to seduce to beguile, and to inveigle involves no physcial force, but such mental control over the person [the judges in my cases] inveigled as to entice him [the judges] to do what it is designed or intended, to beguile him [the judges] to do, and if this be accomplished by falsehood, by deceipt, misrepresentation, or device whatever it may be, which captivates the mind, the crime is committed.

People v. *De Leon*, N.Y., 47 Hun, 310, 311 (First Dep't, 1888). (marked A26-A28).

> This action was clearly a violation of canon 22 of the Canons of Professional Ethics which provides in part that, "The conduct of the lawyer before the Court *** should be characterized by candor and fairness." ...
> This is being published as a warning to all members of the Bar. Henceforth, any attorney who submits papers to this court which deliberately .... withholds information to inveigle the court into making a decision it should not make, will be held in contempt of court and the papers together with all the pertinent facts will be submitted to the Grievance Committee ... for appropriate action.

Garcia v. *Silverman*, 70 Misc. 2d 537-38 (Civil Ct. N.Y.Co. 1972) (marked A29-A30).

For the one and only Constitutional Supreme Court established by and under the U. S. Constitution, my writ is an opportunity to lay down its omnipotent judicial precedent, as the supreme law of the land, holding that practice of inveiglement is not practice of law. For, when inveiglement of one person by another outside the courts has been judicially held to be a crime, shouldn't inveiglement of the judges by a lawyer inside the courts be a more heinous crime, and, that too, as in my two cases, the safety and lives of the occupants are at stake?

My writ is fully supported by historical precedents established throughout judicial history of English common law by such able jurists as **Lord Mansfield** of England (1260s) and in the American and New York jurisprudence by **Chief Justice Marshall** of the U. S. Supreme Court (1800s) and **Chief Justice Cardozo** of the N. Y. State Court of Appeals (1920s-30s).

The following quote authored by **Chief Justice Cardozo** (ironically, of the same Court of last resort that was inveigled by attorneys) is the foundation of my writ:

> If judges have wofully [*sic*] misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors. (**Cardozo, C.J.**, *The Nature of Judicial Process*, at 152; *see also*, at 109-110, 150-152).

Caceci v. *Di Canio Constr. Co.*, 72 N.Y.2d 52, 60 (N. Y. State Court of Appeals 1988).

C. My *Amicus Curiae* to Follow

I now look forward to submitting the complete papers promptly. I apologize for my unfamiliarity with the requirements of our Supreme Court of India Rules of Procedure. I am, thus, finalizing my *amicus curiae* using the same format as my U. S. writ.

I thank you very much for your courtesy and patience.

Respectfully submitted,
s/-
Lalit K. Jain
LKJ/kj
encs

cc (w/encs):
Justice Kuldip Singh
Justice J. S. Verma
Justice P. B. Sawant

[Certain Enclosures to Appendix J]

(News Articles Marked A1-A3;
Items A4-A5 (U. S. Sup. Ct. Rule) and
A6-A30 (Reported Cases) are Not Included).

**(News Articles were Reported
in News Magazine Frontline, April 21, 1995)**

Marked ⊥A1

In Contempt

The Judge vs *the Lawyer*

V. Venkatesan
in New Delhi

On March 9 last year, Justice S.K. Keshote was sitting with Justice Anshuman Singh in Court No. 38 of the Allahabad High Court, the Bench about to hear a case involving Bansal Forgings Ltd. and the U.P. Financial Corporation. Bansal Forgings had taken a loan from the Corporation and defaulted in repayment. The Corporation proceeded against the company, which filed a civil suit and sought an injuction. The trial court ordered that the Corporation would not seize the factory but directed the company to pay the instalments and furnish security for the amount in question.

This order was challenged in an appeal filed before the High Court where it was argued the lower court had no jurisdiction to order payment of instalments or furnishing of security. The petitioner had hired controversial but high-profile lawyer Vinay Chandra Mishra, Chairman of the Bar

Council of India. At the outset, Justice Keshote asked Mishra under which provision the trial court had passed the order. Thereupon Mishra vented his anger against the judge and insisted that he admit the case. Justice Keshote accused Mishra not only of shouting, but threatening him with dire consequences.

The next day, Justice Keshote wrote to Acting Chief Justice V.K. Khanna of the High Court:

> "He said he will get me transferred or see that impeachment motion is brought against me in Parliament. He further said that he has turned up many judges. He created a good scene in the court. He asked me to follow the practice of this court. In sum and substance it is a matter where except to abuse me of mother and sister he insulted me like anything."

He urged the acting Chief Justice to restore the dignity of the judiciary and enable judges to discharge judicial functions without fear or favour.

The acting Chief Justice forwarded the letter on April 5 [1994] to the Chief Justice of India who constituted a Bench to hear the matter on April 15. Mishra, in an affidavit, denied Justice Keshote's allegations and in turn, accused him of "unjustly roughing" him up during the hearing. Mishra claimed he had not gone beyond the legitimate limits of the fearless, honest and independent obligations of an advocate, and that it was Justice Keshote who lost his temper and extended threats to him, which were such as would be punishable under Section 16 of the Contempt of Courts Act, 1971. Justice Keshote denied the allegations. The Supreme Court took the view that there was a *prima*

facie case of criminal contempt of court committed by V.C. Mishra and issued notice against him to show cause why contempt proceedings be not initiated.

On October 7 [1994], Mishra submitted a written apology which the court refused to accept. The Court held that the Supreme Court under the Constitution is charged with correcting lower courts and tribunals and also of protecting them from those whose misconduct tends to prevent the due performance of their duties. The latter functions and powers of the court are independent of Article 129 of the Constitution, which vests it with the powers of the court of record including the power to punish for contempt of itself. As the highest court of record, it is also charged with appellate and superintending powers over the lower courts and tribunals.

Refusing Mishra's demand for an inquiry into the incident and for cross-examination of Justice Keshote the Court held that criminal contempt of court is an offence *sui generis* and hence for such an offence the procedure adopted has always been summary.

> "The threat of immediate punishment is the most effective deterrent against misconduct,"

the court held, and pointed out that Mishra had not filed a further affidavit or any material, or any affidavit by any other person that could be used as evidence.

According to the court, it is not the heat generated in the arguments but the language used, the tone and the manner in which it is expressed and the intention behind using it which determine whether it was calculated to insult, show disrespect, to overbear and overawe the court and to

threaten and obstruct the course of justice. The court concluded that Mishra had

Marked ⊥A2

undoubtedly tried to browbeat, threaten, insult and show disrespect personally to the judge. Since Mishra is a senior member of the Bar and also holds high offices such as those of the Chairman of the Bar Council of India, the President of the U.P. High Court Bar Association, Allahabad and others, his conduct is bound to infect the members of the Bar all over the country, the court said, and justified the need for exemplary punishment.

The court went into the argument that Justice Keshote himself should have taken action for the offence on the spot and felt the judge probably thought it would not be proper for him to be prosecutor, witness and judge all at the same time and decided to report the incident to the Acting Chief Justice. There is nothing unusual in this, although it has resulted in delay in taking action, the court said.

Thus on March 10 [1995], the Supreme Court sentenced Mishra to six weeks of simple imprisonment, suspending the sentence for 4 years with a provision for activating it should he be convicted for any other offence of contempt of court within the period; suspended Mishra from practising as an advocate for three years; and removed him from all elected and nominated offices and posts. The court pointed out that Article 142 (which related to enforcement of decrees and orders of the Supreme Court) cannot be limited or conditioned by any statutory provision, namely, the Advocates Act. It argued that the disciplinary jurisdiction of the Bar Councils in the States and the Bar Councils of India to take action for professional misconduct is different from the jurisdiction of the courts to take action

against advocates for contempt of court.

The court held there is no restriction or limitation on the nature of punishment it may award while exercising its contempt jurisdiction and rejected the argument that action under Article 129 would be violative of Articles 19(1)(a) and 19(1)(g) which guarantee freedom of speech and expression and the right to practise any profession or to carry on any occupation, trade or business subject to reasonable restrictions imposed by laws. According to the court, freedom of speech and expression cannot be a guise for committing contempt of court.

The judgment, controversial as it is, spurred the Supreme Court Bar Association into action. There are not many sympathizers for Mishra and many would not challenge the court's decision. But many advocates are agitated over the court depriving an advocate of his profession on the ground of contempt. The Association on March 20 [1995] filed a writ petition challenging the interpretation of Articles 129 and 142 and its relationship to Articles 19(1)(g) and 21.

The crux of the issue is whether the court under its contempt jurisdiction can exercise its appellate powers. Averred one Supreme Court advocate:

> "The court was left with no option. The court has exercised its extraordinary powers to guard and protect the interests of the judiciary. It is an unpleasant task. But the court can't throw up its hands. Its stand is not illegal. The Advocates Act provides for appeal to the Supreme Court from the BCI's [Bar Council of India's] decision in a case of professional misconduct. The appellate body

> (Supreme Court) exercising original jurisdiction, no doubt, is unusual, but it does not make it unconstitutional. The court has the right to deal with a very, very, difficult situation in this manner."

However, faced with the aggressive attitude of some sections of lawyers who are prone to launching agitations at the slightest pretext, many would like the court to clarify the larger issues involved and that is the reason for filing the writ petition, he said.

The Association has contended that power to punish with imprisonment does not carry with it the incidental power to deprive the contemner of his livelihood. While this petition is yet to be taken up by the Constitutional Bench, the court has issued a *suo motu* contempt notice to Mishra on the basis of certain statements he made on the Supreme Court judgment, defaming the judges, and posted it for hearing on April 5 [, 1995].

Whatever the Supreme Court's decision, the judgment is bound to trigger a debate on the extent of the powers of courts to punish for contempt. The lawyers who have so far resorted to symbolic protests over the judgment, fear it would create a precedent, providing scope for abuse of the power by judges of the lower courts. ■

Marked ⊥A3

A profession on trial

Indira Jaising

To Soli Sorabjee is often attributed the inspired metaphor that judgments of the Supreme Court are like railway tickets--valid only for one day. Whether or not Sorabjee was responsible for this brilliant observation there is no means of knowing, but it has come true in the case of Vinay Chandra Mishra. Even before the ink on the paper was dry and within days of the judgment delivered by Justices Kuldip Singh, J.S. Verma and P.B. Sawant, Chief Justice A.M. Ahmadi thought it fit to refer the question whether the Supreme Court had the power to suspend an advocate from practice--so conclusively decided by Justice Sawant- to a Constitution Bench for a redecision! It was on an application made by the Supreme Court Bar Association by its executive committee which did not even think it fit to call a general body meeting to ascertain the views of its members as to whether they thought the judgment required reconsideration. The process by which the decision was taken to file a petition exposes the cartelisation of the worthy members of the committee. As members of the Bar we stick together; when questioned we close ranks; when faced with the prospect of loss of earnings due to suspension of our professional qualification, we use our professional skills to play with words.

What is at stake in Vinay Chandra Mishra's case is the corruption of the legal profession, the erosion of all standards of ethics among lawyers, the degeneration of the profession from being a noble one to a money-making racket--never mind the litigants. What is on trial in his case is the legal profession as a whole. In asking whether the Supreme Court has the power to suspend the license of a

practicing lawyer, we are really asking the question, has the profession itself not lost its privileged position, a monopolistic position to represent the ordinary person in seeking justice? The answer can only be an unambiguous 'yes'.

Ask any member of society what his or her attitude to lawyers is. I am told a landlord does not want to rent premises to a lawyer, parents do not want to marry their daughter to a lawyer, and litigants hate lawyer. If only they were not a necessary evil, if only they did not enjoy a monopoly of audience, nobody would go to them. The ethos of the profession as a whole has been eroded. The leaders of the Bar who today protest the judgment have done nothing to halt its downslide.

Over 35 years of neglect of the profession by professionals has led to today's impasse. It is a profession which seems to live by a couple of simple rules--any lawyer has a right, indeed a duty, to represent any client; and, to win a case, any lawyer has a right to use any means fair or foul. The net result is huge earnings for the top-of-the-line lawyers, with a sliding scale for those lower down the line.

The earnings of lawyers are so grossly disproportionate to the salaries of judges that in today's legal world the balance of power is loaded in favour of lawyers and against judges. In a society in which social status is measured by bank accounts and slush money, lawyers come out winners against judges in social status and standing. In today's world, it is the lawyers who are in a position to dominate the will of the judges--all talk of independence of the Bar from the domination of the judiciary is hollow.

The greatest achievement of the Vinay Chandra Mishra judgment is that it reasserts the power of the judiciary to control the discipline of the profession, in a climate in which the profession itself was in danger of becoming socially redundant. In asserting the power to conrol the right to practise, the Supreme Court has put the profession on notice, that this monopolistic right to practtise law is subject to the due discharge of its social duty to maintain the dignity of the institutions of the courts.

Judges, better than a committee of peers, can assess the standards of professional ethics that lawyers maintain. The courts are the arena in which the ethical and professional malpractices of a lawyer are played out. So far judges have turned a blind eye to the misconduct of lawyers. This is part of the reason for the downslide in standards.

The Mishra judgment makes it clear they are no longer willing to do so. Lawyers all over the country must welcome the judgement as an opportunity to put their own house in order, especially those of us who have been concerned about the erosion of standards in the judiciary. The legal profession and the judiciary are converse sides of the same coin. If you have a rotten Bar you will get rotten judges.

We must introspect, how does a man like V.C. Mishra come to be elected Chairman of the Bar council of India and President of Bar Associations? How different are Bar Council and Bar Association elections from the Bihar booth-capturing type? What kind of lavish parties are thrown before a Bar election? Does any candidate for a Bar election have an agenda of what he or she believes in or proposes to do for the profession? How does a man like Rajiv Khosla, who publicly beat up a woman lawyer, Sujata

Kohli, for refusing to boycott family courts, continue as President? And what did the Supreme Court Bar Association, which is today so concerned about the independence of the profession, do then? Or is vote-catching the name of the game?

Independence of the profession is not guaranteed by a judgment nor is it taken away by a judgment, but by a truly fearless and ethical Bar. Those who cringe before judges and repeat a hundred times over "My Lord, My Lord" in an attempt to flatter them are not fearless--nor are those who abuse judges. As Judge Sawant puts it: "No one expects a lawyer to be subservient to a judge while presenting his case and not to put forward his argument merely beause the court is against him. In fact that is the moment when he is to put forth his best effort to persuade the court." But then, "Brazenness is not outspokenness and arrogance is not fearlessness."

We live with a Bar that has chosen not to be independent. There are those among the Bar that have misguided fears, especially the juniors, that this judgment will lead to victimisation of lawyers by judges. A laywer who has a case to argue and develops the intellectual argument, need have no such fear. Confidence in the merit of the argument will ensure fearlessness. The history of the use of contempt power against laywers does not justify the fear.

The Mishra case will be a testing point for the profession. It is a time when those who truly value a fearless Bar must separate themselves from the rest and present a credible alternative to our existing Bar Associations and Bar Councils. The Allahabad High Court Bar Association has already made that effort by forming an

alternative association. The Madras High Court Bar Association has passed a resolution welcoming the judgment, indicating a healthy turning point in the consciousness of lawyers towards a cleaner Bar. ■

Indira Jaising is a Senoir Advocate practising in the Supreme Court.

Appendix K

January 27, 1994--Deposition of Thomas Kenealy in Case at Bar Made Available Only After (Not Before) Decision/Order Already Rendered November 23, 1993 Without Its Benefit--Relevant Excerpt from Page 53

**

Q. And did you [Kenealy] speak in favor of the proposal? Did you speak in favor of the proposal?

A. Yeah. I was reading it. Yeah.

MR. AMODIO: Did you simply read the proposal, or did you give some talk about --

A. I made the motion. I made the motion and explained it, and it seconded by the entire board except for Mr. Schiffer.

Q. What did you explain as to the motion and why you favored it?

A. I felt that the boat club should own the stock rather than the marina own the stock. That was basically my feelings. So if the boat club owned all the stock and the members participated in owning the stock, we would have more control over what happened to us in our own destiny.

See, there's two separate corporations here. In one corporation we own most of the stock; in the other corporation we own -- in the other corporation we own it all. Well, we don't own it, but it's a nonprofit organization. And I felt that once the members had the stock, we would be able to participate more in running our own destiny. **

Appendix L

Relevant Provisions of the TBC's Constitution and By-laws that, *Inter Alia*, were Admittedly Violated

** **

Art. I, Sec. 4 -- Object.

Sec. 4 -- **Object** --The object of this Club shall be to **, to promote good fellowship and cooperative privileges among its members.

Art. II, OFFICERS AND DUTIES

Sec. 1 -- **Board of Governors** --The Board of Governors shall be the management body of the Club in all matters, reporting only to the regular Club meetings ** It shall consist of nine [1 petitioner and 8 individual respondents]:

Commodore	Secretary
Vice-Commodore	Treasurer
Rear-Commodore	House Chairman
Fleet Captain	Two Trustees

**

They shall suspend any member for infraction of rules **

To report all progress and activities in detail at each Club meeting.

Sec. 2 -- Trustees -- ** Their duties are: **

(d) To see that all matters are handled according to Constitution or By-laws. **

Sec. 3 -- Commodore -- It shall be the duty of the Commodore: **

(a) To command the squadron.
(b) To preside at all meetings of the Club and the Board of Governors. **
(d) To see that By-laws are enforced along with committee rules and regulations. **

Sec. 4 -- Vice-Commodore -- The Vice-Commodore shall assist the Commodore in the discharge of his duties and in his absence or at his discretion assume his authority and responsiblity. **

Sec. 7 -- Secretary -- It shall be the duties of the Secretary to: **

Keep proper minutes of meetings of Club and Board of Governors. **

Art. IX, REGULAR CLUB MEETINGS

Sec. 1 -- Club Meetings -- Regular Club metings shall be held on the fourth Monday of each month .. .. . **

Sec. 3 -- Special Meetings -- A Special Club meeting may be called by the Board of Governors or when ten or more members serve written notice on the Commodore or Secretary stating business to be transacted. ** No other business will be

discussed. Should the Commodore or the Secretary fail to call such a meeting, then any member of the Board of Governors may do so.

Sec. 4 -- Board of Governors Meetings -- These shall be held on the second Monday of each month, ** The membership shall be informed of the time of such meetings. Special meetings, stating the purpose, may be called by written or telephone notice at least 72 hours prior to date of meeting.

Art. X, ELECTION TO MEMBERSHIP

Sec. 3 -- Regular Membership -- The Regular membership is the sustaining membership with every right and privilege.

Sec. 4 -- Twenty-five Year Membership -- Any Regular member who has been a member in good standing for a period of twenty-five years may be elected to this membership. He will be subject to all Club charges except dues. The Membership will be for life unless by a two-third vote at any Regular Club meeting the member is dropped from this category.

Art. XII

Sec. 3 -- Suspension and Expulsion -- The Board of Governors has full authority to suspend any member for any breach of By-laws but must

submit to ratification of regular Club meeting for expulsion.

Art. XIII, REGULATIONS

Sec. 8 -- Conduct -- Any member slandering the Club or a fellow member or who shall establish law suits against the club for any purpose other than the protection of the By-laws automatically is suspended. Thereafter, he may be expelled by the General Membership.

Objectionable insobriety, immorality, profanity, abuse of officers or other undesirable mannerisms or practice on the part of members or his guests, may cause the member to be suspended or expelled as per Article XII Section 3.